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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF GEORGIA

AT THE

OCTOBER TERM, 1911, AND MARCH TERM, 1912

VOLUME 10

STEVENS AND GRAHAM
REPORTERS

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1912

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HON. RICHARD BREVARD RUSSELL, Judge.

HON. ARTHUR GRAY POWELL,¹ Judge.

HON. JAMES ROBERT POTTLE,² Judge.

GEORGE W. STEVENS, Reporter.

JOHN M. GRAHAM, Assistant Reporter.

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¹Resigned.

²Succeeded Judge POWELL, January 15, 1912. The decisions in which Judge POTTLE is reported as not presiding were in cases argued before he came to the bench of this court.

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TABLE OF CASES REPORTED.

Abram v. Maples	137
Acme Brewing Company v. Rahr Sons Company . . .	564
Adams v. State	801
Alexander v. State	27
Alexander & Sons v. Morris & Company	497
Alkahest Lyceum System v. Campbell	839
Allen v. Windham	169
Allison v. Williams	840
American Art Works v. Tennessee Oil & Gas Company . .	45
American Furniture Co. v. Outcault Advertising Co. . . .	211
Anchors v. Charleston & Western Carolina Railway Company	322
Anderson v. Moss	784
Andrews v. Louisville & Nashville Railroad Company . .	349
Appleby v. City of Jefferson	572
Arnold v. Virginia-Carolina Chemical Company	12
Atkinson v. Fountain	307
Hardaway	389
Atlanta Buggy Company v. Butler	175
Atlantic Coast Line Railroad Company v. Chandler . . .	191
Cheeks	411
Gordon & Co.	311
Thomas	45
Whitaker	207
Avery & Company v. Thomason & Son	11
Ayers & Cunningham v. Satterfield	742
Bailey v. State	829
Baker v. Chicago Crayon Company	294
Gaskins	679
Baker County v. Early County	305
Balchin v. Jones	434
Bales v. First National Bank of Dublin	703
Bank of Southwestern Georgia v. Empire Life Insurance Co.	320
Banks v. Mizell Live Stock Company	362
Bankston v. Patapsco Shoe Company	675

Barclay <i>v.</i> Waterman	108
Barfield <i>v.</i> Macon, Dublin & Savannah Railroad Company	104
Barnard <i>v.</i> Wilson	98
Barnes <i>v.</i> Wilkins	316
Barnes Coal Company <i>v.</i> Southland Knitting Mills	485
Barwick <i>v.</i> Slaughter	544
Basley <i>v.</i> State	470
Baumgartner <i>v.</i> McKinnon	219
Beasley, Couch & Company <i>v.</i> Rogers & Rawlins	383
Beckwith <i>v.</i> Mansfield Lumber & Construction Company	346
Bell <i>v.</i> Hickman	319
Benn <i>v.</i> State	786
Benton <i>v.</i> Citizens Bank of Fitzgerald	308
Beverly & McCollum <i>v.</i> Weston	261
Bird <i>v.</i> Central of Georgia Railway Company	423
Birmingham Fertilizer Company <i>v.</i> Cox & Son	699
Blocker <i>v.</i> Irvine	26
Boatright <i>v.</i> State	29
Booz <i>v.</i> Pyle	760
Bowers <i>v.</i> Southern Railway Company	367
Bowman <i>v.</i> Brown	707
Boyd <i>v.</i> State	451
Wesley	9
Boykin <i>v.</i> Franklin Life Insurance Company	345
Bracewell <i>v.</i> State	830
Brantley <i>v.</i> State	24
Bridges <i>v.</i> Phillips	279
Briesnick <i>v.</i> Ricks	433
Bright <i>v.</i> State	17
Broadwater <i>v.</i> State	458
Brooke <i>v.</i> Waller & Company	346
Brooks <i>v.</i> Griffin	497
Brown <i>v.</i> Bowman	707
Cooper	730
McMichen	506
Southern Railway Company	12
State	50, 216, 457
White	530
Brundrige <i>v.</i> State	816

Bruner <i>v.</i> State	82
Bruton <i>v.</i> Nix	278
Buchanan <i>v.</i> Volunteer State Life Insurance Company . .	255
Burr Manufacturing Company <i>v.</i> Draper & Company . .	321
Bush <i>v.</i> Hessig-Ellis Drug Company	588
State	544
Town of Minter	60
Butler <i>v.</i> Atlanta Buggy Company	175
McDonald	845
State	463
Buxton <i>v.</i> Park	356
Byrd <i>v.</i> State	214
Cain <i>v.</i> State	473
Cairo Melon Growers Association <i>v.</i> National Produce Co. .	338
Calhoun <i>v.</i> Central of Georgia Railway Company	656
Calhoun Brick Company <i>v.</i> Pattillo Lumber Company . .	181
Camp <i>v.</i> Heard	167
Campbell <i>v.</i> Alkahest Lyceum System	839
State	790, 795
Carlsbad Manufacturing Company <i>v.</i> Fletcher	240
Carlton <i>v.</i> Dornblatt	741
Carr <i>v.</i> State	21
Carswell <i>v.</i> State	27, 30
Carter <i>v.</i> State	851
Cartledge <i>v.</i> Southern Railway Company	523
Case Threshing Machine Company <i>v.</i> Donalson	428
Ezzell	647
Cassel & Sister <i>v.</i> Randall	587
Cassidy <i>v.</i> State	123
Cate <i>v.</i> Knight	664
Catlin & Company <i>v.</i> National Duck Mills	240
Cato <i>v.</i> State	786
Central Georgia Power Company <i>v.</i> State	448
Central of Georgia Railway Company <i>v.</i> Bird	423
Calhoun	656
Marshall	351
McGuire	483
Rountree	696
Wilensky	8

Central Oil and Fertilizer Company <i>v.</i> Mathews	336
Chance <i>v.</i> Southern Railway Company	702
Chandler <i>v.</i> Atlantic Coast Line Railroad Company	191
Chandler-Blackstad Mercantile Co. <i>v.</i> Price & Co.	383
Charleston & Western Carolina Railway Co. <i>v.</i> Anchors	322
Finley	329
Chastain <i>v.</i> State	36
Chatfield <i>v.</i> State	40
Chattanooga Medicine Company <i>v.</i> McDougald	653
Cheeks <i>v.</i> Atlantic Coast Line Railroad Company	411
Cheney <i>v.</i> State	451
Cherry Lake Turpentine Co. <i>v.</i> Lanier Armstrong Co.	339
Chicago Crayon Company <i>v.</i> Baker	294
Childs <i>v.</i> Cunnard	175
State	829
Christie <i>v.</i> Shingler	529
Citizens Bank of Fitzgerald <i>v.</i> Benton	308
Citizens Bank of Valdosta <i>v.</i> Peeples	703
City of Atlanta <i>v.</i> Cotton	397
Dannie	471
Walker	28
Wynne	818
City of Jefferson <i>v.</i> Appleby	572
Duke	572
Moon	572
Phillips	572
City of Moultrie <i>v.</i> Rice	454
City of Rome <i>v.</i> Flannigan	217
Harris	409
Morton	604
City of Sandersville <i>v.</i> Stanley	360
City of Thomasville <i>v.</i> Whidden	194
City of Tifton <i>v.</i> Coker	66
City of Waycross <i>v.</i> Davis	384
City of Waynesboro <i>v.</i> Dixon	801
City of Winder <i>v.</i> Moore	384
Clark <i>v.</i> Fuller	701
Hartfelder & Cochran	422
Clarke <i>v.</i> Trippe	467

Clements <i>v.</i> Union Savings Bank	350
Clemons <i>v.</i> Peavy	507
Cochran <i>v.</i> Minter	337
Cochran & Sons <i>v.</i> Prince & Sons	495
Cofield <i>v.</i> Moore	197
Coker <i>v.</i> City of Tifton	66
Cole Brothers Lightning-Rod Company <i>v.</i> Linder	102
Coleman <i>v.</i> Mullis	175
Coleman & Flanders <i>v.</i> Edenfield	355
Collins <i>v.</i> State	34
Conoly <i>v.</i> State	822
Cook <i>v.</i> State	219, 580
Cooper <i>v.</i> Brown	730
Most Nursery Company	351
Cornelia Furniture Co. <i>v.</i> Gray & Dudley Hardware Co.	605
Cotton <i>v.</i> City of Atlanta	397
Covington Buggy Company <i>v.</i> Sams	191
Cowart <i>v.</i> Waycross Electric Light & Power Co.	26
Cox <i>v.</i> McKinley	492
Cox & Son <i>v.</i> Birmingham Fertilizer Company	699
Crabb <i>v.</i> Southern Railway Company	559
Creamer <i>v.</i> Murphey	593
Cronheim <i>v.</i> Postal Telegraph-Cable Company	716
Crowder <i>v.</i> Maples	142
State	355
Cunnard <i>v.</i> Childs	175
Cutts <i>v.</i> Watt-Harley-Holmes Company	417
Daniel <i>v.</i> Persons	830
Dannenberg Company <i>v.</i> Salant & Salant	263
Dannie <i>v.</i> City of Atlanta	471
Davis <i>v.</i> City of Waycross	384
Dayries Rice Company <i>v.</i> Knowles	567
De Medicis <i>v.</i> Henderson	190
Dennis <i>v.</i> State	219
Dickson <i>v.</i> Matthews	542
District Grand Lodge No. 18 <i>v.</i> Shelton	527
Dixon <i>v.</i> City of Waynesboro	801
Donalson <i>v.</i> Case Threshing Machine Company	428
Dornblatt <i>v.</i> Carlton	741

Fletcher v. Carlsbad Manufacturing Company	240
Young	183
Fletcher Guano Company v. Vorus	380
Flint River and Northeastern Railroad Company v. Maples	573
Florida & Georgia Tobacco Company v. Georgia, Florida & Alabama Railway Company	38
Flowers v. Strickland	739
Foote & Davies Co. v. Evans Furniture Co.	194
Ford v. State	442
Western Union Telegraph Company	606
Fountain v. Atkinson	307
Fountain	758
Fourth National Bank v. Yatesville Banking Company . .	1
Franklin Life Insurance Company v. Boykin	345
Freeman v. Maxwell Furniture Company	316
Frey & Company v. Langley Manufacturing Company . .	753
Frost & Company v. Powell	95
Fuller v. Clark	701
Inman	680
State	34, 117
Gainous v. Martin	210
Ganey v. State	777
Garland v. Rumble	347
Garnett v. State	109
Gartner v. Mayor and Council of Americus	754
Gaskins v. Baker	679
General Baptist Convention of Georgia v. Grant	392
George v. State	209
Georgia Automobile Company v. Merchants National Bank .	280
Georgia Cotton Company v. McNamara	669
Georgia and Florida Railway v. Johnson	101
Georgia, Florida & Alabama Railway Company v. Florida & Georgia Tobacco Company	38
Georgia, Florida & Alabama Railway Co. v. Patterson . .	306
Georgia Southern & Florida Railway Co. v. Kell	675
Ransom	558
Roberts	100
Gibson v. State	117
Glenn v. State	128

Goddard <i>v.</i> Hyland Chemical Company	13
Gordon <i>v.</i> State	35
Gordon & Co. <i>v.</i> Atlantic Coast Line Railroad Co.	311
Grace <i>v.</i> Finleyson	480
Grant <i>v.</i> General Baptist Convention of Georgia	392
Graves <i>v.</i> Hunnicutt	12
Gray & Dudley Hardware Co. <i>v.</i> Cornelia Furniture Co.	605
Greene County <i>v.</i> Walker	347
Griffin <i>v.</i> Brooks	497
Groover <i>v.</i> Tattnall Supply Company	679
Grusin <i>v.</i> State	149
Gunn <i>v.</i> State	819
Gunter <i>v.</i> Few	100
Gurley <i>v.</i> State	841
Hall <i>v.</i> Roehr & Company	379
Hammond <i>v.</i> Jacques	286
State	143
Handley <i>v.</i> Merchants and Farmers Bank	383
Hansford <i>v.</i> National Bank of Tifton	270
Hardaway <i>v.</i> Atkinson	389
Hardu <i>v.</i> State	47
Harris <i>v.</i> City of Rome	409
Paulk	334
State	70, 366, 835
Hartfelder & Cochran <i>v.</i> Clark	422
Hartwell Railway Company <i>v.</i> Kidd	771
Harwell <i>v.</i> State	115
Hasty <i>v.</i> Macon, Dublin & Savannah Railroad Company	103
Haygood <i>v.</i> State	394
Hays <i>v.</i> State	823
Hazzard <i>v.</i> Mayor and Aldermen of Savannah	191
Heard <i>v.</i> Camp	167
State	118, 546
Henderson <i>v.</i> De Medicis	190
Patrick	283
Hendon <i>v.</i> State	78
Herndon <i>v.</i> State	118
Herrine <i>v.</i> McGhee Cotton Company	700
Herring <i>v.</i> State	88

Hesse Envelope and Lithographing Company <i>v.</i> Loyless	660
Hessig-Ellis Drug Company <i>v.</i> Bush	588
Hickman <i>v.</i> Bell	319
Hicks <i>v.</i> Moyer	488
Higdon <i>v.</i> Williamson	376
High Point Furniture Company <i>v.</i> Jowers	297
Hill <i>v.</i> McCord	254
Hodnett <i>v.</i> Mann	666
Holcomb <i>v.</i> Mashburn	781
Holliday <i>v.</i> Mayor and Council of Athens	709
Holliman <i>v.</i> Washington County	322
Holloway <i>v.</i> State	49
Holtzendorf <i>v.</i> Manbeck	317
Hooks <i>v.</i> Willis	366
Horkan <i>v.</i> Eason	236
Horne <i>v.</i> Mayor and Council of Macon	208
Rosenheim Shoe Company	582
Howe <i>v.</i> State	215
Hubbard <i>v.</i> Shaw	487
Hudson <i>v.</i> Louisville & Nashville Railroad Company	169
Hunnicutt <i>v.</i> Graves	12
Hunt <i>v.</i> Seaboard Air-Line Railway	273
Hunter <i>v.</i> State	831
Hutson <i>v.</i> Sutton	844
Hyland Chemical Company <i>v.</i> Goddard	13
Illinois Central Railroad Company <i>v.</i> Doughty	317
Inman <i>v.</i> Fuller	680
Irvine <i>v.</i> Blocker	26
Jackson <i>v.</i> State	142
Jacques <i>v.</i> Hammond	286
James <i>v.</i> Pepper	266
State	13
Jewett <i>v.</i> Smith	294
Johnson <i>v.</i> Georgia and Florida Railway	101
Joiner <i>v.</i> Stovall & Brother	204
Jones <i>v.</i> Balchin	434
O'Pry	375
State	59
Tyre	754

Jones & Son <i>v.</i> Wood & Brother	735
Jordan <i>v.</i> State	218
Jowers <i>v.</i> High Point Furniture Company	297
Kaufman <i>v.</i> Seaboard Air-Line Railway	248
Keen <i>v.</i> Taylor	106
Keenan <i>v.</i> State	792
Kell <i>v.</i> Georgia Southern & Florida Railway Co.	675
Kendall <i>v.</i> Moore	375
Kennedy <i>v.</i> State	794
Kicklighter <i>v.</i> Malloch & Company	605
Kidd <i>v.</i> Hartwell Railway Company	771
State	147
Kight <i>v.</i> Robinson	548
Killens <i>v.</i> State	115
Kinard <i>v.</i> State	133
Kirk <i>v.</i> State	450
Knight <i>v.</i> Cate	664
Knowles <i>v.</i> Dayries Rice Company	567
Taylor	588
Lackey <i>v.</i> Old Kentucky Manufacturing Company	382
Landreth <i>v.</i> State	399
Langley Manufacturing Company <i>v.</i> Frey & Company	753
Langston <i>v.</i> State	82
Lanier Armstrong Co. <i>v.</i> Cherry Lake Turpentine Co.	339
Lawrence <i>v.</i> State	786
Layton <i>v.</i> Duren	394
Lee <i>v.</i> McFarland	698
Summers	441
Linder <i>v.</i> Cole Brothers Lightning-Rod Company	102
Little <i>v.</i> State	286
Livingston <i>v.</i> Martin	766
Louisville & Nashville Railroad Company <i>v.</i> Andrews	349
Hudson	169
Loyless <i>v.</i> Hesse Envelope and Lithographing Company	660
Luther Publishing Company <i>v.</i> Musgrove	650
Mack <i>v.</i> State	835
Macon, Dublin & Savannah Railroad Company <i>v.</i> Barfield	104
Hasty	103
Smith	706
Warnock	26

Malloch & Company v. Kicklighter	605
Manbeck v. Holtzendorf	317
Mann v. Hodnett	666
Mansfield Lumber & Construction Company v. Beckwith	346
Maples v. Abram	137
Crowder	142
Flint River and Northeastern Railroad Company	573
State	786
Marsh Cypress Company v. Thompson	303
Marshall v. Central of Georgia Railway Company	351
Martin v. Dunbar	287
Gainous	210
Livingston	766
Mendel	417
State	455, 795, 798
Mashburn v. Holcomb	781
Mathews v. Central Oil and Fertilizer Company	336
Mathis v. State	77
Matthews v. Dickson	542
State	302
Taylor	852
Maxwell & Company v. Rice	643
Maxwell Furniture Company v. Freeman	316
May v. Moore	198
Mayor and Aldermen of Savannah v. Hazzard	191
Mayor and Council of Americus v. Gartner	754
Mayor and Council of Athens v. Holliday	709
Mayor and Council of Macon v. Horne	208
Morris	298
Mayor and Council of Vienna v. Whitehead	337
McCarter v. McCarter	754
McClure v. Duncan	758
McCord v. Hill	254
McCranie v. Shipp	544
McCullough v. State	403
McDonald v. Butler	845
McDougald v. Chattanooga Medicine Company	653
McFarland v. Lee	698
McFarlin v. Reeves	581

McGhee Cotton Company <i>v.</i> Herrine	700
McGinty <i>v.</i> State	218
McGuire <i>v.</i> Central of Georgia Railway Company	483
McKinley <i>v.</i> Cox	492
McKinnon <i>v.</i> Baumgartner	219
McMichen <i>v.</i> Brown	506
McNamara <i>v.</i> Georgia Cotton Company	669
Mendel <i>v.</i> Martin	417
Merchants and Farmers Bank <i>v.</i> Handley	383
Merchants National Bank <i>v.</i> Georgia Automobile Company	280
Metropolitan Life Insurance Company <i>v.</i> Morrow	433
Wallace	517
Michigan Mutual Life Insurance Company <i>v.</i> Parker	697
Miller Grocery Company <i>v.</i> Eastport Sardine Company	287
Minter <i>v.</i> Cochran	337
Mizell Live Stock Company <i>v.</i> Banks	362
Monk-Sloan Supply Company <i>v.</i> Quitman Oil Company	390
Montgomery <i>v.</i> State	801
Monticello Vehicle Company <i>v.</i> Thomas	260
Moon <i>v.</i> City of Jefferson	572
Moore <i>v.</i> City of Winder	384
Cofield	197
Kendall	375
May	198
Nunez Gin and Warehouse Company	350
State	805
Morris <i>v.</i> Mayor and Council of Macon	298
West	651
Morris & Company <i>v.</i> Alexander & Sons	497
Morrow <i>v.</i> Metropolitan Life Insurance Company	433
Morse <i>v.</i> State	61
Morton <i>v.</i> City of Rome	604
Moss <i>v.</i> Anderson	784
Most Nursery Company <i>v.</i> Cooper	351
Moye <i>v.</i> State	215
Moyer <i>v.</i> Hicks	488
Mullis <i>v.</i> Coleman	175
Murphey <i>v.</i> Creamer	593
Musgrove <i>v.</i> Luther Publishing Company	650

Nance <i>v.</i> Patterson	843
National Bank of Tifton <i>v.</i> Hansford	270
Roberts	272
National Duck Mills <i>v.</i> Catlin & Company	240
National Produce Distributing Co. <i>v.</i> Cairo Melon Asso.	338
Nero <i>v.</i> State	23
Newman <i>v.</i> United States Casualty Company	479
Nix <i>v.</i> Bruton	278
Norman <i>v.</i> State	802
Nunez Gin and Warehouse Company <i>v.</i> Moore	350
Odum <i>v.</i> State	27
Old Kentucky Manufacturing Company <i>v.</i> Lackey	382
O'Neal <i>v.</i> State	474
O'Pry <i>v.</i> Jones	375
Outcault Advertising Co. <i>v.</i> American Furniture Co.	211
Pace <i>v.</i> Pruitt	201
Virginia-Carolina Chemical Company	261
Paper Mills Company <i>v.</i> Sartorious	522
Parham <i>v.</i> Southern Railway Company	531
Park <i>v.</i> Buxton	356
Parker <i>v.</i> Michigan Mutual Life Insurance Company	697
Stimpson Specialty Company	295
Parrish <i>v.</i> State	836
Patapsco Shoe Company <i>v.</i> Bankston	675
Patrick <i>v.</i> Henderson	283
Shields & Suddeth	506
Patten <i>v.</i> State	20
Patterson <i>v.</i> Georgia, Florida & Alabama Railway Co.	306
Nance	843
Patterson & Company <i>v.</i> Sims-McKenzie Grain Company	742
Pattillo Lumber Company <i>v.</i> Calhoun Brick Company	181
Patton <i>v.</i> Southern Railway Company	678
Patton Sash, Door and Building Co. <i>v.</i> Wilkerson	697
Paulk <i>v.</i> Harris	334
Payne <i>v.</i> Rome Coca-Cola Bottling Company	762
Peacock <i>v.</i> State	402
Peavy <i>v.</i> Clemons	507
Peoples <i>v.</i> Citizens Bank of Valdosta	703
Pennington & Evans <i>v.</i> Douglas, Augusta & Gulf Ry. Co.	288

Pepper <i>v.</i> James	266
Persons <i>v.</i> Daniel	830
Peters <i>v.</i> Queen Insurance Company	289, 479
Peterson <i>v.</i> Stalvey	649
Phelps <i>v.</i> State	41
Phillips <i>v.</i> Bridges	279
City of Jefferson	572
Ponder <i>v.</i> State	834
Postal Telegraph-Cable Company <i>v.</i> Cronheim	716
Powell <i>v.</i> Frost & Company	95
Price & Company <i>v.</i> Chandler-Blackstad Mercantile Company	383
Prince & Sons <i>v.</i> Cochran & Sons	495
Pruitt <i>v.</i> Pace	201
Puffer Manufacturing Company <i>v.</i> Rivers	154
Pyle <i>v.</i> Booz	760
Queen Insurance Company <i>v.</i> Peters	289, 479
Quitman Oil Company <i>v.</i> Monk-Sloan Supply Company	390
Rahr Sons Company <i>v.</i> Acme Brewing Company	564
Randall <i>v.</i> Cassel & Sister	587
Ransom <i>v.</i> Georgia Southern & Florida Railway Co.	558
Rawlings <i>v.</i> Sheppard	350
Rayfield <i>v.</i> State	48
Redfearn <i>v.</i> Thompson	550
Reeves <i>v.</i> McFarlin	581
Register <i>v.</i> State	623
Reisman <i>v.</i> Wester	96
Renfro <i>v.</i> State	38
Rhodes <i>v.</i> State	68
Rice <i>v.</i> City of Moultrie	454
Maxwell & Company	643
Rickerson <i>v.</i> State	464
Ricks <i>v.</i> Briesnick	433
Rivers <i>v.</i> Puffer Manufacturing Company	154
State	487
Riverside Milling & Power Co. <i>v.</i> Seaboard Air-Line Ry.	303
Roberts <i>v.</i> Georgia Southern & Florida Railway Co.	100
National Bank of Tifton	272
Robinson <i>v.</i> Kight	548
State	462, 791

Robinson & Johnson <i>v.</i> Rothchilds & Company	237
Roehr & Company <i>v.</i> Hall	379
Rogers <i>v.</i> Douglas	486
Durrence	657
Rogers & Rawlins <i>v.</i> Beasley, Couch & Company	383
Rome Coca-Cola Bottling Company <i>v.</i> Payne	762
Rosengrant <i>v.</i> Esteve Brothers & Company	286
Rosenheim Shoe Company <i>v.</i> Horne	582
Rosenthal & Company <i>v.</i> Farmers Oil & Guano Company	416
Rothchilds & Company <i>v.</i> Robinson & Johnson	237
Rountree <i>v.</i> Central of Georgia Railway Company	696
Rumble <i>v.</i> Garland	347
Sailors <i>v.</i> Flanders	839
Salant & Salant <i>v.</i> Dannenberg Company	263
Sams <i>v.</i> Covington Buggy Company	191
Sartorious <i>v.</i> Paper Mills Company	522
Satterfield <i>v.</i> Ayers & Cunningham	742
Savannah Electric Company <i>v.</i> Veruki	201
Scott <i>v.</i> Turner	560
Seaboard Air-Line Railway <i>v.</i> Hunt	273
Kaufman	248
Riverside Milling &c. Co.	303
Smith	227
Sewell <i>v.</i> State	451
Shaw <i>v.</i> Hubbard	487
State	776
Sharpe <i>v.</i> State	212
Shelton <i>v.</i> District Grand Lodge No. 18	527
Shepherd Company <i>v.</i> Stovall Company	498
Sheppard <i>v.</i> Rawlings	350
Shields & Suddeth <i>v.</i> Patrick	506
Shingler <i>v.</i> Christie	529
Shipp <i>v.</i> McCranie	544
Sims <i>v.</i> Willer Manufacturing Company	390
Sims-McKenzie Grain Company <i>v.</i> Patterson & Company	742
Slack <i>v.</i> Elkins	571
Slade <i>v.</i> State	802
Slaughter <i>v.</i> Barwick	544

Smith <i>v.</i> Fleming	701
Jewett	294
Macon, Dublin & Savannah Railroad Co.	706
Seaboard Air-Line Railway	227
State	36, 840
Worley	280
Solomon <i>v.</i> State	469
Southern Express Company <i>v.</i> Fine & Brother	161
Southern Railway Company <i>v.</i> Bowers	367
Brown	12
Cartledge	523
Chance	702
Crabb	559
Flanigan	745
Parham	531
Patton	678
Strozier & Waters	157
Wallace	90
Southern Refining Co. <i>v.</i> Farmers Oil & Guano Co.	415
Southland Knitting Mills <i>v.</i> Barnes Coal Company	485
Speer <i>v.</i> State	817
Spicer <i>v.</i> First National Bank of Fitzgerald	503
Stalvey <i>v.</i> Peterson	649
Stanley <i>v.</i> City of Sandersville	360
State	153
Stanton <i>v.</i> State	786
State <i>v.</i> Adams	801
Alexander	27
Bailey	829
Basley	470
Benn	786
Boatright	29
Boyd	451
Bracewell	830
Brantley	24
Bright	17
Broadwater	458
Brown	50, 216, 457
Brundrige	816

State v. Bruner	82
Bush	544
Butler	463
Byrd	214
Cain	473
Campbell	790, 795
Carr	21
Carswell	27, 30
Carter	851
Cassidy	123
Cato	786
Central Georgia Power Company	448
Chastain	36
Chatfield	40
Cheney	451
Childs	829
Collins	34
Conoly	822
Cook	219, 580
Crowder	355
Dennis	219
Dowdell	834
Downer	827
Dukes	473
Eady	818
Ector	777
English	791
Fitzgerald	70
Flahive	401
Ford	442
Fuller	34, 117
Ganey	777
Garnett	109
George	209
Gibson	117
Glenn	128
Gordon	35
Grusin	149
Gunn	819

State v. Gurley	841
Hammond	143
Hardu	47
Harris	70, 366, 835
Harwell	115
Haygood	394
Hays	823
Heard	118, 546
Hendon	78
Herndon	118
Herring	88
Holloway	49
Howe	215
Hunter	831
Jackson	142
James	13
Jones	59
Jordan	218
Keenan	792
Kennedy	794
Kidd	147
Killens	115
Kinard	133
Kirk	450
Landreth	399
Langston	82
Lawrence	786
Little	826
Mack	835
Maples	786
Martin	455, 795, 798
Mathis	77
Matthews	302
McCullough	403
McGinty	218
Montgomery	801
Moore	805
Morse	61
Moye	215

State v. Nero	23
Norman	802
Odum	27
O'Neal	474
Parrish	836
Patten	20
Peacock	402
Phelps	41
Ponder	834
Rayfield	48
Register	623
Renfro	38
Rhodes	68
Rickerson	464
Rivers	487
Robinson	462, 791
Sewell	451
Sharpe	212
Shaw	776
Slade	802
Smith	36, 840
Solomon	469
Speer	817
Stanley	153
Stanton	786
Stewart	215, 442
Tabb	786
Thomas	142
Toles	444
Tolver	33
Turner	18
Tyus	23
Walker	85
Wall	136
Watson	794
Whipple	214
Wilcox	122
Williams	142, 395
Wilson	67

State <i>v.</i> Woods	476
Woodward	487
Wooten	78
Yopp	458
Young	116
Stewart <i>v.</i> State	215, 442
Stimson Specialty Company <i>v.</i> Parker	295
Story <i>v.</i> Williams	392
Stovall & Brother <i>v.</i> Joiner	204
Stovall Company <i>v.</i> Shepherd Company	498
Strickland <i>v.</i> Flowers	739
Strozier & Waters <i>v.</i> Southern Railway Company	157
Summers <i>v.</i> Lee	441
Sutton <i>v.</i> Hutson	844
Tabb <i>v.</i> State	786
Tattnall Supply Company <i>v.</i> Groover	679
Taylor <i>v.</i> Keen	106
Knowles	558
Matthews	652, 852
Tennessee Oil & Gas Company <i>v.</i> American Art Works	45
Thomas <i>v.</i> Atlantic Coast Line Railroad Co.	45
Monticello Vehicle Company	260
State	142
Thomason & Son <i>v.</i> Avery & Company	11
Thompson <i>v.</i> Marsh Cypress Company	303
Redfearn	550
Toles <i>v.</i> State	444
Tolver <i>v.</i> State	33
Town of Minter <i>v.</i> Bush	60
Trippe <i>v.</i> Clarke	467
Turner <i>v.</i> Scott	560
State	18
Tyre <i>v.</i> Jones	754
Tyus <i>v.</i> State	23
Union Savings Bank <i>v.</i> Clements	350
United States Casualty Company <i>v.</i> Newman	479
Veruki <i>v.</i> Savannah Electric Company	201
Virginia-Carolina Chemical Company <i>v.</i> Arnold	12
Pace	261

Volunteer State Life Insurance Company <i>v.</i> Buchanan	255
Vorus <i>v.</i> Fletcher Guano Company	380
Walker <i>v.</i> City of Atlanta	28
Greene County	347
State	85
Wall <i>v.</i> State	136
Wallace <i>v.</i> Metropolitan Life Insurance Company	517
Southern Railway Company	90
Waller & Company <i>v.</i> Brooke	346
Warnock <i>v.</i> Macon, Dublin & Savannah Railroad Co.	26
Washington County <i>v.</i> Holliman	322
Waterman <i>v.</i> Barclay	108
Watson <i>v.</i> State	794
Watt-Harley-Holmes Company <i>v.</i> Cutts	417
Waycross Electric Light & Power Co. <i>v.</i> Cowart	26
Wesley <i>v.</i> Boyd	9
West <i>v.</i> Morris	651
Wester <i>v.</i> Reisman	96
Western Union Telegraph Company <i>v.</i> Ford	606
Weston <i>v.</i> Beverly & McCollum	261
Whidden <i>v.</i> City of Thomasville	194
Whipple <i>v.</i> State	214
Whitaker <i>v.</i> Atlantic Coast Line Railroad Company	207
White <i>v.</i> Brown	530
Whitehead <i>v.</i> Mayor and Council of Vienna	337
Wilcox <i>v.</i> State	122
Wilensky <i>v.</i> Central of Georgia Railway Company	8
Wilkerson <i>v.</i> Patton Sash, Door and Building Co.	697
Wilkins <i>v.</i> Barnes	316
Willer Manufacturing Company <i>v.</i> Sims	390
Williams <i>v.</i> Allison	840
State	142, 395
Story	392
Williams-Thompson Company	251
Williams-Thompson Company <i>v.</i> Williams	251
Williamson <i>v.</i> Higdon	376
Willis <i>v.</i> Hooks	366
Wilson <i>v.</i> Barnard	98

Wilson <i>v.</i> State	67
Windham <i>v.</i> Allen	169
Wood & Brother <i>v.</i> Jones & Son	735
Woods <i>v.</i> State	476
Woodward <i>v.</i> State	487
Wooten <i>v.</i> State	78
Worley <i>v.</i> Smith	280
Wright Mercantile & Lumber Co. <i>v.</i> Flemister Grocery Co.	702
Wynne <i>v.</i> City of Atlanta	818
Yatesville Banking Company <i>v.</i> Fourth National Bank	1
Yopp <i>v.</i> State	458
Young <i>v.</i> Fletcher	183
State	116

GEORGIA CASES CITED BY THE COURT.

Abram v. Maples, 10 A. 137.	142	Atlantic Coast Line Railroad Co.	
Adams v. Candler, 114/152.	101	r. McDonald, 135/635.	686
Adams v. Haigler, 123/665.	416	Attleton v. Bibb Mfg. Co., 5 A.	
Adkins v. State, 115/582.	19	777.	179
Alabama Great Southern R. Co.		Augusta & Summerville Railroad	
r. Daffron, 136/555.	512	Co. v. Randall, 85/298.	806
Allen v. Atlanta, 7 A. 99.	801	Augusta Railway Co. r. Glover,	
Allen v. Grant, 122/552.	585	92/132.	686
Allen v. State, 4 A. 458.	829	Augusta Southern Railroad Co.	
Almand v. Equitable Mortgage		r. McDade, 105/134.	685
Co. 113/934.	529	Aultman v. Mason, 83/212.	663
Almand v. Ga. R. Co., 102/151.	753	Austin v. State, 6 A. 211.	803
American Insurance Co. v. Bailey,		Awtrey v. Campbell, 118/464.	497
6 A. 424.	415	Ayers v. State, 3 A. 305.	18
Anderson v. Cuthbert, 103/767.		Bagley v. Columbus Ry. Co.	
	439, 705	98/626.	211
Anderson v. McLean, 94/798.	417	Bailey v. Dunaway, 8 A. 713.	649
Anderson v. State, 14/709.	556	Bailie v. Augusta Savings Bank,	
Andrews v. Kinsel, 114/390.	373	95/277.	721
Arnold v. L. & N. R. Co., 4 A. 520.	100	Baker v. Richmond City Mill	
Arnold v. State, 51/144.	149	Works, 105/225.	672
Athens v. Atlanta, 6 A. 244.	398	Baldwin v. Walden, 30/829.	187
Atkinson v. So. Ry. Co., 114/146.	750	Ball v. State, 9 A. 162.	401, 515
Atlanta & Birmingham Air-Line		Bank of Blakely v. Cobb, 5 A.	
Ry. v. McManus, 1 A. 302.	389	289.	250
Atlanta & Charlotte Railway Co.		Banks v. Walker, 112/542.	223
r. Gravitt, 93/369.	686	Barber v. Woods, 39/643.	511
Atlanta, Birmingham & Atlantic		Barnett v. E. Tenn. R. Co.,	
Ry. Co. v. Howard, 125/478.	673	87/766.	534
Atlanta Consolidated Street Ry.		Barron v. State, 126/92.	471
Co. v. Arnold, 100/566.	691	Bashinski v. State, 5 A. 3.	143
Atlanta Glass Co. v. Noizet,		Bashinsky v. W. U. Tel. Co., 1	
88/43.	577	A. 761.	727
Atlanta Journal v. Mayson,		Bass v. Milledgeville, 122/177.	604
92/640.	553	Bates v. Bigby, 123/729.	164
Atlanta, Knoxville & Northern		Baumgartner v. McKinnon,	
Ry. Co. v. Smith, 1 A. 163.	433	137/165.	219
Atlantic & Birmingham Railway		Beall v. Clark, 71/818.	599
Co. r. Spires, 1 A. 22.	161	Beaty v. Sears, 132/516.	
Atlantic Coast Line Railroad Co.			286, 436, 504
r. Davis, 5 A. 214.	576	Beckwith v. Mansfield Co., 10 A.	
Atlantic Coast Line Railroad Co.		346.	346
r. Harris, 1 A. 668.	674	Bell v. Ober, 96/214.	315

Bell v. Ober, 111/872.	249	Bryan v. State, 120/201.	136
Bell v. State, 130/76.	50	Bryant v. State, 8 A. 389.	470
Bennefield v. State, 80/107.	42	Buffington v. Smith, 58/341.	732
Bennett v. State, 86/404.	554, 813	Bull v. State, 80/704.	42
Berry v. Jackson, 115/196.	700	Bullard v. Brewer, 118/198.	363
Berry v. State, 97/202.	777	Bullard v. Trice, 63/165.	70
Berry v. State, 105/683.	394	Burge v. State, 62/17.	827
Bethune v. State, 48/505.	794	Burns v. State, 89/527.	86
Bines v. State, 118/320.	829	Busby v. State, 120/858.	777
Bing v. Bank of Kingston, 5 A.		Butler v. Ambrose, 51/152.	415
578.	585	Cable Piano Co. v. Hancock, 2	
Bishop v. State, 9/121	556	A. 73.	428
Bivins v. State, 5 A. 434.	67	Cain v. State, 7 A. 24.	50
Black v. Kaplan, 9 A. 811.	102	Caldwell v. R. & D. R. Co.,	
Blackman v. State, 78/592.	809	89/550.	750
Blackwell v. State, 74/816.	665	Calhoun v. Calhoun, 81/93.	267
Blankenship v. State, 112/402.	407	Calhoun v. Cen. Ry. Co., 7 A.	
Block v. Tinsley, 95/436.	250	528.	657
Blocker v. Boswell, 109/237.	489	Callaway v. Atlanta, 6 A. 354.	165
Blood Balm Co. v. Cooper, 83/461.	766	Callaway v. Mims, 5 A. 9.	398
Bone v. State, 102/391.	803	Campbell v. Thomasville, 6 A.	
Booz v. Neal, 6 A. 279.	760	212.	48, 128
Borum v. Swift, 125/202.	697	Carolina Portland Cement Co. v.	
Bowen v. Frick, 75/786.	439	Turpin, 126/677.	265
Boyd v. State, 4 A. 58.	829	Carter v. Buchanan, 2/338.	213
Branch v. State, 5 A. 651.	32	Carter v. So. Ry. Co., 3 A. 40.	100
Brandon v. Pritchett, 126/286. 9.	671	Carter v. State, 35/265.	404
Bray v. Commerce, 5 A. 605.	458	Carter v. Williamson, 106/280.	341
Broach v. O'Neal, 94/475.	436	Case Threshing Machine Co. v.	
Brooks v. State, 3 A. 458.	21	Hodges, 9 A. 722.	13
Broomhead v. Chisolm, 47/393.	141	Cassidy v. State, 10 A. 123.	142, 401
Broughton v. Aiken, 7 A. 318.	285	Cawthon v. State, 119/395.	797
Broughton v. Thornton, 50/571.	188	Central Bank v. Almand, 135/231.	441
Brown v. Bowman, 119/153.	431	Cen. R. Co. v. Bank, 73/383.	722
Brown v. Brown, 132/712.	756	Cen. R. Co. v. Butler, 8 A. 243.	764
Brown v. G., C. & N. Ry. Co.,		Cen. R. Co. v. Dorsey, 116/719.	525
119/90.	231	Cen. R. Co. v. Henderson, 6 A.	
Brown v. Pickett, 3 A. 554.	605	459.	331
Brown v. Rome Foundry Co., 5 A.		Cen. R. Co. v. Henson, 121/462.	686
143.	179	Cen. R. Co. v. Jones, 7 A. 165.	773
Brown v. State, 28/439.	70	Cen. R. Co. v. Manchester Mfg.	
Brown v. State, 40/689.	628	Co., 6 A. 254.	320, 498
Brown v. State, 65/332.	828	Cen. R. Co. v. Moore, 5 A. 564.	333
Brown v. State, 122/568.	42	Cen. R. Co. v. Motes, 117/923.	233
Brown v. State, 135/656.	57	Cen. R. Co. v. Motz, 130/414.	692
Brown v. Todd, 124/939.	190	Cen. R. Co. v. Pickett, 87/734.	164
Broxton v. Nelson, 103/330.	244	Cen. R. Co. v. Roberts, 91/513.	750
Brumby v. Rickoff, 94/429.	206	Chandler v. A. C. L. R. Co.,	
Bruton v. Wooten, 15/570.	253	136/638.	191
Bryan v. Meaders, 9 A. 326.	379		

Chandler-Blackstad Co. v. Price, 10 A. 383.	677	Connor v. Hodges, 7 A. 153.	415
Channell v. State, 109/152.	545	Coody v. Gress Lumber Co., 82/793.	342
Chapman v. Americus Oil Co., 117/881.	680	Cook v. State, 26/593.	629
Chapman v. Boyd, 68/455.	655	Cook v. State, 137/486.	580
Chapman v. Skellie, 65/125.	522	Cooley v. Moss, 123/710.	309
Chapman v. State, 120/855.	32	Cooney v. Sweat, 133/511.	501
Chapman v. Taliaferro, 1 A. 238.	433	Cooper v. State, 106/120.	837
Cheatwood v. Buchanan, 9 A. 828.	82	Cotton v. Atlanta, 10 A. 397.	471
Chenall v. Palmer Brick Co., 117/106.	763	Cottrell v. Merchants Bank, 89/508.	438
Cherry Lake Turpentine Co. v. Lanier Armstrong Co., 10 A. 339.	437	Couch v. State, 28/64.	213
Christian v. Knight, 128/501.	265	Coursey v. Southern Railway Co., 113/297.	536
Cincinnati Glass Co. v. Stephens, 3 A. 766.	567	Cox v. McKinley, 10 A. 492.	498
Citizens Bank v. Shaw, 132/771.	699	Cox v. Prater, 67/588.	494
City Council of Augusta v. Mackey, 113/64.	847	Crawford v. Clark, 110/735.	511
City Council of Augusta v. Tharpe, 113/153.	713	Crawford v. Southern Ry. Co., 106/870.	691
City of Columbus v. Ogletree, 96/177.	301	Crawford v. State, 4 A. 789.	239
City of Columbus v. Ogletree, 102/293.	300	Crockett v. State, 80/105.	477
Clark v. Gordon, 82/613.	733	Croom v. State, 90/430.	805
Clark v. State, 117/254.	32	Crosby v. McGraw, 133/560.	342
Clarke v. Stowe, 132/621.	341	Crouch v. Spooner, 9 A. 695.	155
Clay v. Central R. Co., 84/345.	685	Cruse v. Foster, 76/723.	783
Clay v. W. U. Tel. Co., 81/285.	726	Cunnegin v. State, 118/125.	470
Clegg-Ray Co. v. Indiana Scale Co., 125/558.	295	Dacey v. State, 15/286.	213
Cleveland v. State, 7 A. 622.	42	Daniel v. Persons, 137/826.	830
Cochrell v. Langley Mfg. Co., 5 A. 317.	764	Daniels v. State, 78/99.	113
Cofer v. Benson, 92/794.	224, 668	Darby v. State, 9 A. 700.	463
Cohen v. Aldrich, 5 A. 256.	753	Darsey v. State, 136/501.	625
Cohen v. State, 7 A. 5.	125, 400	Davis v. Dougherty County, 116/491.	146
Coker v. State, 115/210.	45	Davis v. Millen, 111/452.	262
Coleman v. State, 94/87.	580	Davis v. State, 114/104.	804
Coleman v. State, 3 A. 298.	442	Davis Sulphur Ore Co. v. At- lanta Guano Co., 109/607.	744
Coleman v. State, 5 A. 366.	794	Davis v. Waycross, 10 A. 384.	390
Coleman v. State, 5 A. 766.	76	Day v. Crawford, 13/508.	96
Collier v. Vason, 12/440.	437, 504	Dean v. State, 43/218.	395
Collins v. Taylor, 128/789.	205	Delay v. Felton, 133/15.	107
Commercial Bank v. Warthen, 119/990.	584	DeLay v. So. Ry. Co., 115/934.	179
Compton v. Fender, 132/483.	577	DeLoach v. Delk, 119/884.	759
Condon v. Jesup, 5 A. 100.	573	Dennard v. Butler, 2 A. 198.	190
		Dennard v. State, 2/137.	733
		Dixon v. State, 116/186.	114
		Donovan v. Simmons, 96/340.	282, 437

Dorough v. Equitable Mortgage Co., 118/178.	840	Fleming v. Satterfield, 4 A. 351.	363, 839
Dorsey v. State, 108/477.	404	Florida R. Co. v. Berry, 116/19.	160
Dorsey v. State, 126/633.	33	Flor. R. Co. v. Burney, 98/1.	
Dorsey v. State, 3 A. 298.	442		485, 540
Dougherty v. Taylor Co., 5 A. 776.	588	Flury v. Hightower Co., 132/300.	179
Douglas, Augusta & Gulf Ry. Co. v. Swindle, 2 A. 550.	459	Folds v. State, 123/167.	545
Douglas v. Bunn, 110/162.	341	Fontaine v. Bergen, 55/410.	655
Dowda v. State, 74/12.	449	Forsyth Mfg. Co. v. Castlen, 112/205.	416
Dowling v. Feeley, 72/557.	511	Fountain v. Fountain, 7 A. 361.	381, 791
Downing v. Anderson, 120/373.	575	Fourth Nat. Bank v. Mayer, 89/108.	723
Driver v. State, 112/229.	66	Fowler v. Coker, 107/817.	253
Drought v. State, 101/544.	777	Freeman v. Exchange Bank, 87/45.	722
Drysdale v. State, 83/744.	56	Freeman v. Savannah Elec. Co., 130/449.	331
Duke v. Neisler, 134/594.	436	Futch v. State, 90/472.	32
Dunaway v. Hodge, 127/690.	141	Galloway v. State, 25/596.	557
Durant L. Co. v. Sinclair L. Co., 2 A. 209.	314	Gann v. State, 30/67.	27, 465
Early County v. Baker County, 137/126.	305	Gardner v. Moore, 51/268.	343
Eaves v. Fears, 131/820.	756	Garnett v. State, 10 A. 109.	153
Echols v. Phillips, 112/700.	108	Gay v. State, 105/599.	42
Elder v. Woodruff Co., 9 A. 484.	315	Georgia, Florida & Alabama Ry. Co. v. Sasser, 4 A. 276.	62, 522
Ellison v. Ga. R. Co., 87/691.	205	Georgia Northern Railway Co. v. Hutchins, 119/510.	596
Emerson v. Knight, 130/105.	550	Geo. R. Co. v. Benton, 117/785.	524
Epps v. Waring, 93/765.	663	Geo. R. Co. v. Cole, 77/77.	513
Equitable Manufacturing Co. v. Biggers, 121/381.	365	Geo. R. Co. v. Kennedy, 58/489.	484
Erwin v. Harris, 87/335.	159	Geo. R. Co. v. Spinks, 111/571.	685
Evans v. Griffin, 1 A. 327.	783	Geo. R. Co. v. Wall, 80/202.	45
Evans v. Josephine Mills, 119/448.	336	Geo. R. Co. v. Wright, 124/608.	491
Ewing v. Moses, 50/264.	222	Georgia Railway & Electric Co. v. Gilleland, 133/621.	484, 541
Exposition Cotton Mills v. W. & A. R. Co., 83/441.	774	Georgia Railway & Electric Co. v. McAllister, 126/447.	525, 539
Fair v. Met. L. Ins. Co., 2 A. 373.	316	Georgia Railway & Electric Co. v. Reeves, 123/697.	539
Fallon v. State, 5 A. 659.	116	Georgia Southern & Florida Ry. Co. v. Ransom, 5 A. 540.	558
Farkas v. Duncan, 94/27.	504	Giddens v. Gaskins, 7 A. 221.	193
Farmer v. State, 91/720.	806	Gilbert v. State, 90/692.	833
Farmer v. State, 100/41.	797	Giles v. State, 116/522.	795
Farmers & Traders Bank v. University Pub. Co., 9 A. 128.	656	Glawson v. Sou. Bell Tel. Co., 9 A. 455.	619
Ferst's Sons v. Bank, 111/229.	783	Glessner v. Longley, 125/676.	309
Finkelstein v. State, 105/617.	470	Glover v. State, 126/594.	449
Finney v. Mayer, 61/500.	656		
Fitzgerald v. State, 10 A. 70.	398		
Flannery v. Harley, 117/483.	313		
Fleming v. Hammond, 19/145.	427		

Goette v. Lane, 111/400.	344	Hays v. Jordan, 85/741.	250, 315
Goggans v. Monroe, 31/301.	554	Head v. Georgia Pacific Ry. Co.,	
Golatt v. State, 130/18.	515	79/358.	750
Goodin v. So. Ry. Co., 125/630.	775	Heath v. State, 91/126.	788
Gordon v. A. C. L. R. Co., 7 A.		Henderson v. Dade Coal Co.,	
354.	312	100/568.	173
Gordon v. Cobb, 4 A. 49.	738	Henderson Elevator Co. v. North	
Gosha v. State, 56/36.	836	Georgia Milling Co., 126/279.	564
Gossett v. State, 123/431.	56	Hendrix v. State, 5 A. 819.	447
Governor v. Kemp, 12/466.	733	Hendrix v. Vale Royal M. Co.,	
Graves v. Hunnicutt, 8 A. 99.	12	134/712.	179
Gray v. Bass, 42/270.	739	Hester v. Gardner, 128/531.	550
Gray v. Griffin, 111/361.	847	Hightower v. State, 9 A. 236.	152
Green v. Ansley, 92/647.	744	Hill v. Ludden, 113/320.	439
Greenfield v. McIntyre, 112/691.	294	Hill v. State, 53/472.	132
Greer v. State, 6 A. 785.	484	Hill v. State, 64/453.	56
Gresham v. Connally, 114/906.	200	Hill v. W. U. Tel. Co., 85/430.	100
Grice v. Haskins, 73/701.	182	Hodgkins v. State, 89/761.	36
Grier v. Enterprise Stone Co.,		Holland v. Williams, 3 A. 636.	316
126/17.	295	Holliday v. Athens, 10 A. 709.	754
Griffin v. Griffin, 116/754.	665	Holliman v. Washington County,	
Groves v. State, 8 A. 690.	112	8 A. 718.	322
Gude v. Bailey Co., 4 A. 230.	567	Holmes v. Langston, 110/861.	315
Gwinn v. Almand, 110/318.	417	Holt v. Edmondson, 31/357.	204
Haines v. State, 8 A. 631.	443	Holt v. Navassa Guano Co.,	
Hale v. State, 120/184.	788	114/666.	12
Haley v. State, 124/216.	788	Horne v. Rogers, 110/362.	25, 455
Hall v. State, 48/607.	32	Horton v. State, 120/307.	183
Hall v. State, 124/651.	462	Howard v. Porter, 99/649.	282
Hall v. State, 7 A. 115.	112, 797	Howell v. Atkinson, 3 A. 58.	201
Hall v. State, 8 A. 747.	66, 215, 788	Huckabee v. State, 7 A. 677.	126
Ham v. Parkerson, 68/830.	663	Hudgins v. Coca-Cola Bottling	
Hamilton v. Stewart, 108/476.	587	Co., 122/695.	766
Hamrick v. Darnell, 43/433.	665	Humphries v. Nix, 77/98.	108
Hansford v. Nat. Bank, 10 A.		Idlett v. Atlanta, 123/821.	713
270.	272	Ingram v. Hilton & Dodge Co.,	
Hardee v. Carter, 94/482.	295	108/137.	179
Harden v. Lang, 110/394.	566	Inman v. State, 72/269.	810
Harley v. Davis, 7 A. 386.	759	Isom v. State, 83/378.	149
Harper v. Keller, 110/420.	342	Ivey v. Rome, 129/286.	604
Harris v. McArthur, 90/216.	86	Jackson v. State, 91/322.	404
Hart v. So. Ry. Co., 119/927.	747	Jackson v. State, 116/578.	442
Hartley v. Colquitt, 72/352.	732	Jackson v. State, 10 A. 142.	401
Hatcher v. Comer, 73/418.	737	Jacobus v. Children of Israel,	
Hateley v. State, 118/79.	479	107/518.	848
Hawkins v. State, 6 A. 109.	798	Jaques v. Stewart, 81/82.	250
Hayden v. State, 69/731.	386	Jaques & Tinsely Co. v. Carstar-	
Hayes v. State, 58/35.	25	phen Co., 131/1.	500
Haygood v. State, 137/168.	394	Jenkins v. Seaboard Ry., 3 A. 381.	164
Haynes v. State, 17/465.	50	Jenkins v. State, 3 A. 146.	37

Jenkins v. State, 4 A. 859.	143	Loeb v. Jennings, 133/796.	217, 387
Johns v. Tifton, 122/734.	572	Lott v. Peterson, 95/516.	665
Johnson v. Johnson, 113/942.	206	Louisville & Nashville Railroad	
Johnson v. Jones, 87/65.	343	Co. v. Bradford, 135/522.	95
Johnson v. State, 61/213.	796	Louisville & Nashville Railroad	
Johnson v. State, 2 A. 405.	827	Co. v. Burns, 9 A. 241.	773
Joiner v. Singletary, 106/257.	583	Louisville & Nashville Railroad	
Jolly v. State, 5 A. 454.	50	Co. v. Rogers, 136/674.	789
Jones v. Dougherty, 11/308.	213	Louisville & Nashville Railroad	
Jones v. G., C. & N. R. Co.,		Co. v. Tift, 100/87.	416
103/570.	534	Louisville & Nashville Railroad	
Jones v. Kern, 101/309.	182	Co. v. Wilson, 123/62.	848
Jones v. Nunn, 12/469.	107	Lowe v. Allen, 68/226.	343
Jones v. State, 2 A. 433.	794	Loyd v. Wight, 20/578.	569
Jones v. State, 7 A. 694.	194	Lufburrow v. Everett, 113/1056.	344
Jordan v. Jones, 110/47.	759	Luke v. Livingston, 9 A. 116.	
Jordan v. State, 22/559.	629		674, 700, 766
Kahrs v. Kahrs, 115/288.	496	Lyndon v. Georgia Ry. & Elec.	
Kaigler v. Brannon, 137/36.	9	Co. 129/353.	496, 565
Kaufman v. Seaboard Ry. 10 A.		Lyons v. Planters Bank, 86/485.	531
248.	314	Mack v. State, 116/546.	216
Kavanaugh v. So. Ry. Co., 120/62.	774	Macon, Dublin & Savannah R.	
Kelly v. Strouse, 116/872.	320	Co. v. Hamilton, 9 A. 254.	207
Kelly Co. v. Moore, 128/683.	156	Macon, Dublin & Savannah R.	
Kelsey v. State, 62/558.	795	Co. v. Moore, 108/84.	535
Kennedy v. McCarthy, 73/346.	156	Maddox v. Pierce, 74/838.	783
Kessler v. State, 119/301.	135	Maine v. Howell, 7 A. 311.	428
Kidd v. State, 10 A. 148.	709	Mallett v. Watkins, 132/700.	700
Kinard v. State, 10 A. 133.	398	Mallory v. Moon, 130/591.	250
King v. Sears, 91/577.	107, 343	Malone v. State, 49/217.	116
King v. Sullivan, 93/621.	584	Manchester Manufacturing Co.	
King v. Yarbray, 136/212.	602	v. Pope, 115/542.	179
Kitchens v. State, 41/217.	628	Mangham v. State, 87/552.	629
Knight v. Isom, 113/613.	107	Marietta Fertilizer Company v.	
Lacey v. Hutchinson, 5 A. 865.	253	Beckwith, 4 A. 245.	383
Lamar v. Lamar, 118/850.	680	Marshall v. Livingston, 77/21.	250
Land v. State, 5 A. 98.	445	Marshall v. Macon, 103/725.	685
Langley v. Augusta, 118/590.	361, 847	Martin v. Martin, 135/162.	673
Lanier v. Kelly, 6 A. 738.	168	Martin v. State, 123/478.	470
Lauchheimer v. Jacobs, 126/261.	250	Mason v. N., C. & St. L. Ry.,	
Lavender v. State, 9 A. 856.	742	135/741.	173
Law v. Nunn, 3/90.	659	Massey v. Columbus, 75/658.	713
Lee v. State, 8 A. 413.	797	Mathews v. Bishop, 106/564.	47
Lepinsky v. State, 7 A. 285.	788	Mathewson v. Belmont Mills Co.,	
Levin v. American F. Co.,		76/359.	160
133/670.	205	Mayor &c. of Cordele v. Wil-	
Lewis v. State, 99/692.	665	liams, 7 A. 445.	415
Lissner v. State, 84/669.	665	Mayor &c. of Dalton v. Wilson,	
Liverpool Insurance Company v.		118/100.	409
Ellington, 94/785.	294		

Mayor &c. of Montezuma v. Wilson, 82/206.	194	Mize v. State, 135/291.	57, 545
Mayor &c. of Savannah v. Waldner, 49/316.	713	Mobley v. State, 114/544.	470
McAuliffe v. Vaughan, 135/852.	840	Molyneaux v. Collier, 30/731.	253
McBride v. Tel. Pub. Co., 102/422.	677	Monahan v. Nat. Realty Co., 4 A. 680.	764
McCabe v. State, 1 A. 719.	828	Moore v. Reid, 110/248.	560
McCall v. Hunter, 8 A. 612.	313	Moore v. State, 1 A. 502.	42, 838
McCalla v. Am. Freehold Co., 90/113.	506	Moss v. Sell, 8 A. 588.	160
McClurg v. State, 2 A. 624.	479	Moye v. State, 65/754.	442, 837
McCray v. State, 134/416.	597	Mulherin v. Porter, 1 A. 153.	198
McDonald v. Ludowici, 3 A. 654.	573, 801	Mulkey v. State, 1 A. 521.	117, 835
McDonald v. State, 2 A. 633.	60	Mullins v. Matthews, 122/286.	602
McDonnell v. Cen. Ry. Co., 118/86.	763	National Furniture Company v. Edwards, 105/240.	320
McGee v. State, 97/199.	777	National Lumber Company v. Turner, 2 A. 750.	206
McLendon v. Finch, 2 A. 42.	342	Neal v. Boykin, 129/676.	223
McLendon v. Wilson, 52/41.	246	Neal v. Gray, 124/511.	722
McLeod v. Southern Fertilizer Co., 7 A. 322.	441	Neel v. Morris, 73/406.	378
McRae v. State, 71/99.	545	Nesbit v. State, 43/238.	462
McRae v. Stillwell, 111/65.	342	Newton v. Nunnally, 4/356.	219
Medical College v. Rushing, 1 A. 468.	848	Nobles v. State, 127/213.	33
Melvin v. State, 120/490.	18	Norcross Mfg. Co. v. Summerour, 114/156.	7
Mendel v. Miller, 126/834.	744	Norman v. State, 10 A. 802.	841
Merchants & Miners Trans. Co. v. Moore, 124/482.	286	Norton v. Aiken, 134/24.	188
Metropolitan Street Railroad Co. v. Johnson, 90/501.	806	Oak City Co. v. Kennedy Co., 4 A. 344.	698
Mill v. State, 1 A. 134.	836	Oatis v. Brown, 59/711.	437
Miller v. Luckey, 132/581.	192	Ober v. Cochran, 118/396.	724
Miller v. Moore, 83/684.	566	Ocean Steamship Co. v. Hamilton, 112/901.	588
Miller v. Roberts, 9 A. 511.	365	O'Connell v. Friedman, 118/831.	47
Miller v. Speight, 61/460.	389	O'Dell v. Meacham, 114/910.	321
Miller v. State, 58/203.	629	O'Dell v. State, 120/155.	805, 851
Miller v. State, 8 A. 540.	70	Oklahoma Vinegar Company v. Carter, 116/140.	102
Miller v. Wilson, 98/567.	285	Oliver Construction Company v. Reeder, 7 A. 276.	309
Mills v. Mercer, <i>Dudley</i> , 158.	187	O'Neal v. Miller, 9 A. 180.	194
Minchew v. Nahunta L. Co., 5 A. 154.	673	Orr Shoe Co. v. Kimbrough, 99/143.	531
Missouri State L. Ins. Co. v. Lovelace, 1 A. 449.	291, 596	Osgood v. State, 63/791.	395
Mitchell v. Georgia & Alabama Railway, 111/760.	158, 489	O'Shields v. State, 81/301.	455
Mitchell v. State, 41/527.	394	O'Shields v. State, 125/310.	57
Mitchell v. State, 6 A. 554.	788	Oxford v. Ford, 67/362.	668
		Palmer v. McNatt, 95/435.	506
		Palmer Brick Co. v. Chenall, 119/837.	764
		Papworth v. State, 103/36.	145

Parker v. Georgia Pacific Rail- way Co., 83/540.	514	Raleigh & Gaston Railroad Co. v. Pullman Co., 122/700.	212,
Parker v. Gortatowsky, 127/561.	343		672, 697
Parker v. State, 3 A. 23.	568	Ramsey v. State, 92/53.	37
Parker-Hensel Engineering Co. v. Schuler, 7 A. 396.	384	Ransome v. Christian, 56/352.	553
Parks v. Simpson, 124/523.	381	Ray v. Anderson, 117/136.	596
Patterson v. Evans, 91/799.	436	Ray v. State, 4 A. 67.	797
Patton v. State, 117/238.	570	Reid v. State, 20/688.	557
Paulk v. Creech, 8 A. 738.	99, 378	Reynolds v. Jones, 7 A. 123.	504
Payton v. Gulf Line Ry. Co., 4 A. 762.	164	Rhinehart v. State, 7 A. 425.	149
Pearce v. Renfroe, 68/194.	203	Rhode Island Locomotive Works v. Empire Lumber Co., 91/642.	98
Pearson v. Wimbish, 124/701.	387, 818	Rhodes Furniture Company v. Jenkins, 2 A. 475.	317
Penn v. McGhee, 6 A. 635.	206	Richardson v. Perrin, 133/721.	342
Pennington v. Douglas, Augusta & Gulf R. Co., 3 A. 665.	288	Richmond & Danville R. Co. v. Allison, 86/145.	540
Pennington v. Douglas, Au- gusta & Gulf R. Co., 6 A. 854.	288	Richmond & Danville R. Co. v. Howard, 79/53.	359
Pepper v. James, 7 A. 521.	268	Richmond Mills v. W. U. Tel. Co., 123/216.	727
Perdue v. State, 135/277.	148	Richter v. State, 4 A. 274.	415
Perry v. B. & W. R. Co., 119/819.	165	Ricks v. State, 16/600.	627
Perry v. Paschal, 103/134.	667	Riley v. State, 1 A. 651.	826
Peters v. Queen Ins. Co., 137/440.	479	Riley v. W. & T. R. Co., 133/417.	232
Phillips v. Hudson, 9 A. 779.	212	Roach v. Atlanta, 7 A. 172.	454, 573
Pickens v. Ga. R. Co., 126/517.	750	Roberts v. Gordon, 86/386.	733
Pines v. State, 21/227.	114	Roberts v. Ivey, 63/623.	596
Pope v. Graniteville Mfg. Co., 1 A. 176.	698	Roberts v. State, 83/369.	18
Port Royal Ry. Co. v. Davis, 95/292.	485	Robinson v. Ga. R. Co., 117/168.	685
Porter v. Johnson, 96/146.	593, 602	Robinson v. State, 109/506.	408
Porter v. State, 124/297.	37	Robinson v. State, 128/258.	804
Postal Tel. Co. v. Morse, 5 A. 504.	621	Robinson v. State, 6 A. 696.	797
Poulos v. Atlanta, 4 A. 567.	573	Rockmore v. Cullen, 94/648.	321
Powell v. State, 101/20.	50	Rogers v. Roberts, 88/150.	560
Pritchard v. Comer, 71/18.	224	Rose v. State, 133/356.	591
Pritchett v. State, 92/65.	455	Roughton v. Atlanta, 113/948.	847
Proctor & Gamble Co. v. Blakely Oil &c. Co., 128/606.	212	Roul v. E. Tenn. R. Co., 85/197.	534
Pryor v. Ludden, 134/288.	355	Rounsaville v. Leonard Co. 127/735.	102
Pulliam v. Dillard, 71/599.	656	Rowell v. Neves, 21/125.	388
Pyle v. State, 4 A. 811.	50	Rowland v. Page, 4 A. 269.	698
Pyles v. State, 3 A. 29.	50	Rusher v. State, 94/365.	114
Quiggle v. Vining, 125/100.	484	Rushin v. Shields, 11/636.	224
Ragland v. State, 2 A. 492.	829	Russell v. State, 68/785.	407
Rainey v. State, 94/599.	27	Rylander v. Allen, 125/206.	258
		Salter v. Smith, 55/245.	101
		Sams v. Covington Buggy Co., 10 A. 191.	262

Sappington v. A. & W. P. R. Co., 127/178.	524	Smalls v. So. Ry. Co., 115/137.	179
Saunders v. State, 7 A. 46.	801	Smith v. Elberton, 5 A. 286.	361
Savannah Electric Company v. Badenhoop, 6 A. 371:	526	Smith v. Ferrario, 105/51.	395
Savannah Electric Company v. Bell, 124/663.	686	Smith v. First Nat. Bank, 115/608.	785
Savannah Electric Company v. Hodges, 6 A. 470.	172	Smith v. Georgia Loan Co., 113/975.	493
Savannah Electric Company v. Wheeler, 128/550.	173	Smith v. Hatcher, 102/158.	685
Savannah, Florida & Western Ry. Co. v. Austin, 104/614.	485	Smith v. Kitchens, 51/159.	732
Savannah, Florida & Western Ry. Co. v. Hardin, 110/433.	66	Smith v. Maddox-Rucker Co., 135/151.	316
Savannah, Florida & Western Ry. Co. v. Renfro, 115/774.	596	Smith v. State, 2 A. 414.	837
Sawyer v. Blakely, 2 A. 159.	818	Smith v. State, 7 A. 252.	148, 799
Scarborough v. State, 46/26.	135	Smith v. State, 8 A. 680.	478
Schofield Mfg. Co. v. Cochran, 119/901.	716	Smith v. W. & T. R. Co., 83/671.	559
Scott v. Atwell, 63/764.	223	Soell v. State, 4 A. 340.	597, 835
Scott v. State, 29/263.	136	Southern Express Company v. Briggs, 1 A. 300.	164
Seaboard Air-Line Railway v. Bishop, 132/71.	539	Southern Express Company v. Hilton, 94/450.	164
Seaboard Air-Line Railway v. Bradley, 125/193.	535	Southern Express Company v. Pope, 5 A. 689.	166
Seisel v. Wells, 99/159.	531	Southern Mining Co. v. Brown, 107/264.	505
Self v. Adel Lumber Co., 5 A. 846.	484	Southern Mutual Insurance Co. v. Turnley, 100/303.	294
Sellers v. S., F. & W. Ry. Co., 123/386.	161, 249	Sou. R. Co. v. Chance, 7 A. 650.	702
Sext v. Geise, 80/698.	783	Sou. R. Co. v. Covenia, 100/46.	691
Sharpe v. State, 10 A. 212.	786	Sou. R. Co. v. Davis, 132/118.	333
Shealey v. Livingston, 8 A. 642.	844	Sou. R. Co. v. Harrell, 119/521.	207
Sheats v. Rome, 92/535.	713	Sou. R. Co. v. Maddox, 7 A. 650.	164
Sheffield v. Whitfield, 6 A. 762.	431	Sou. R. Co. v. Moore, 133/806.	775
Sheppard v. Miller Co., 7 A. 760.	431	Sou. R. Co. v. Oliver, 1 A. 734.	391
Shrouder v. State, 121/615.	478	Sou. R. Co. v. Scott, 128/244.	540
Simmons v. Cates, 56/609.	224	Sou. R. Co. v. Thompson, 129/367.	575
Simmons v. Peagler, 7 A. 252.	544	Sou. R. Co. v. Tollerson, 129/647.	100
Simmons v. Seaboard Railway, 120/225.	536	Sou. R. Co. v. Wallace, 133/553.	559
Simon v. Savannah, 4 A. 172.	573	Sou. R. Co. v. Waters, 125/520.	773
Simpson v. State, 92/41.	15	Sou. R. Co. v. Watson, 110/681.	747
Singleton v. Close, 130/717.	342	Southwestern Railroad Co. v. Paulk, 24/356.	484
Sinkovitz v. Peters Land Co., 5 A. 788.	764	Southwestern Railroad Co. v. Singleton, 67/306.	536
Sivell v. Hogan, 119/284.	698	Spalding v. Chamberlin, 130/654.	245
Small v. Williams, 87/681.	259	Spence v. State, 7 A. 825.	116, 633
		Stallworth v. Macon, 125/250.	454
		Stamper v. Hayes, 25/546.	253
		Stamps v. Newton County, 8 A. 230.	348, 692

State Historical Association v. Silverman, 6 A. 560.	663	Turbaville v. State, 58/546.	635
Steen v. Harris, 81/681.	98, 438	Turley v. A., K. & N. R. Co., 127/594.	536
Stevenson v. State, 83/575.	136	Turner v. State, 114/421.	557
Stewart v. Garrett, 119/386.	850	Turner v. State, 10 A. 18.	67
Stewart v. Langston, 103/90.	503	Turner v. Ware, 2 A. 57.	663
Stewart v. Postal Tel. Co., 131/31.	416	Twilley v. State, 9 A. 435.	23
Stickney v. Chapman, 115/761.	702	United States Casualty Co. v. Newman, 137/447.	480
Stoner v. State, 5 A. 720.	48, 130, 216	Veazey v. Crawfordville, 126/89.	801
Stradley v. Atlanta, 7 A. 441.	818	Venable v. Atlanta, 7 A. 190.	818
Strickland v. State, 133/76.	50	Wade v. State, 12/25.	556
Strickland v. State, 137/1.	13, 23, 122, 131, 453	Wadley Southern Railway Co. v. State, 137/497.	774
Strozier v. Carroll, 31/557.	49	Walker v. State, 97/213.	67
Stubbs v. Waddell, 4 A. 264.	668	Walker v. State, 8 A. 214.	324
Suber v. G., C. & N. R. Co., 96/42.	535	Walker v. State, 9 A. 863.	470
Sullivan v. Padrosa, 122/339.	851	Wall v. Mount, 121/831.	497
Summerall v. Graham, 62/729.	567	Wall v. Schwarz, 9 A. 845.	168
Susong v. Fla. C. & P. R. Co., 115/361.	773	Wall v. State, 126/549.	545
Sutton v. State, 122/158.	796	Wallace v. So. Ry. Co., 6 A. 526.	90
Sutton v. Washington, 4 A. 30.	66	Walters v. Porter, 3 A. 73.	584
Swafford v. Berrong, 84/65.	461	Walton Guano Co. v. Copelan, 112/319.	677
Swilley v. Hooker, 126/353.	703	Ware v. State, 7 A. 797.	42
Taylor v. Coney, 101/657.	759	Watkins v. Nugen, 118/375.	107
Taylor v. Folds, 2 A. 453.	501	Watkins v. State, 68/832.	404
Terry v. Cotton Co., 136/187.	670, 700	Watkins v. State, 82/231.	36
Thomas v. Price, 88/533.	250	Watson v. Augusta Brewing Co., 124/121.	766
Thomas v. State, 59/784.	788	Watson v. Hazlehurst, 127/298.	416, 673
Thomas v. State, 121/331.	629	Watson v. State, 116/607.	149
Thomas Furniture Co. v. T. & C. Furniture Co., 120/879.	286, 436	Waycaster v. State, 136/95.	114
Thompson v. Carter, 6 A. 606.	491	Webster v. Thompson, 55/431.	222
Thompson v. Passmore, 9 A. 771.	759	Welborn v. State, 116/522.	795
Thompson v. Williams, 9 A. 367.	840	Weldon v. Colquitt, 62/449.	101
Tiedeman v. Fertilizer Co., 109/661.	724	West v. Colquitt, 71/559.	731
Tilton v. State, 52/478.	407	West v. State, 6 A. 105.	829
Tooke v. Oglethorpe, 4 A. 567.	573	Western & Atlantic Railroad Co. v. Bussey, 95/584.	278
Tooke v. State, 4 A. 495.	66	Western & Atlantic Railroad Co. v. Earwood, 104/127.	534
Toole v. Edmondson, 104/776.	753	Western & Atlantic Railroad Co. v. Exposition Mills, 81/522.	773
Traders Ins. Co. v. Mann, 118/385.	291	Western & Atlantic Railroad Co. v. Ferguson, 113/713.	715
Travelers Ins. Co. v. Sheppard, 85/765.	294	Western & Atlantic Railroad Co. v. Wilson, 71/22.	536
Truitt-Silvey Hat Company v. Callaway, 130/637.	383		

Western Union Telegraph Co. v. Ford, 8 A. 514.	607, 728	Wilkerson v. State, 91/734.	57
Western Union Telegraph Co. v. Harris, 6 A. 260.	686	Wilkins v. Fulcher, 9 A. 68.	817
Western Union Telegraph Co. v. Watson, 94/202.	727	Williams v. Gunnels, 56/521.	553
Whatley v. Macon & Northern R. Co., 104/764.	534	Williams v. Johnston, 94/722.	417
Whidden v. Merry, 8 A. 564.	544	Williams v. State, 70/890.	442
Whigham v. Fountain, 132/277.	738	Williams v. State, 100/511.	214
White v. Fulton, 68/513.	514	Williams v. State, 4 A. 853.	835
White v. Kennon, 83/343.	179	Williamson v. Cen. R. Co., 127/125.	753
White v. Montgomery, 58/204.	588	Wilson v. Atlanta, 63/291.	713
White v. State, 7 A. 22.	148	Wilson v. Cobb, 4 A. 272.	835
White S. M. Co. v. Horkan, 7 A. 283.	415	Winn v. Ingram, 2 A. 757.	516
Whitehurst v. Jones, 117/803.	546	Wood v. Safe Co., 96/120.	677
Wholesale Mercantile Co. v. Jack- son, 2 A. 782.	569	Woodbridge v. Drought, 118/671.	703
Wiggins v. Tyson, 112/744.	395	Woodward v. McDonald, 116/750.	656
Wight v. Hester, 24/485.	699	Worlds v. Ga. R. Co., 99/283.	179, 331
Wilensky v. Cen. R. Co., 136/889.	8, 165	Worth v. Carmichael, 114/699.	156
		Wostenholms v. State, 70/720.	149
		Wright v. Hollywood Cemetery Corporation, 112/884.	848
		Wright v. Sheppard, 5 A. 298.	337
		Wright v. Smith, 128/432.	848
		Zipperer v. Seaboard Ry., 129/387.	179

CASES
DECIDED IN THE
COURT OF APPEALS OF GEORGIA
AT THE
OCTOBER TERM, 1911

**3147. YATESVILLE BANKING CO., for use, etc., v. FOURTH
NATIONAL BANK.**

1. Where a drawee of a negotiable instrument pays it to a person holding it through and under a forged indorsement of the payee's name, he may (subject to certain limitations) recover from the person receiving the money on the paper the sum so paid, either in an action in the nature of an action for money had and received, or in an action upon the warranty implied from the presentation of the instrument that the indorsements thereon are genuine, or in an action upon an express warranty that the indorsements are genuine, if such an express warranty has been made.
2. If the person presenting and receiving payment on a negotiable instrument bearing the forged indorsement of the payee is himself innocent of the forgery, it is incumbent on the person who has so paid to give to the person to whom the payment has been made notice of the forgery within a reasonable time after discovering it. If he fails in this duty, the person so paid may, when sued for reimbursement by the person who has done the paying, set up, as a defense to the action, any loss that has been occasioned to him by reason of the failure to give timely and reasonable notice. However, as lack of notice, followed by loss, is an affirmative defense, it is not necessary for the plaintiff to negative it in his petition.
3. The person paying a negotiable instrument upon the express warranty of the person presenting it that all prior indorsements are genuine (the warranty being written on the instrument itself) may recover from his warrantor, if it turns out that the indorsement of the payee is forged, without showing that he has returned or tendered the instrument to him, notwithstanding some of the signatures on it may be genuine, and the instrument may not be worthless from a commercial standpoint. The

person who has thus paid out the money on the instrument bearing the forged indorsement and the warranty may hold it as evidence until reimbursement has been made or tendered.

4. "The mere fact that a plaintiff in his pleadings declares his intention of suing for the use of a third person does not raise any question as to the liability, either of the plaintiff or of the defendant, to such third person. The words declaring an intention to use the recovery for the benefit of another are, as to the defendant, harmless surplusage. He is not concerned in what disposition is to be made of the recovery."

DECIDED NOVEMBER 7, 1911.

Complaint; from city court of Atlanta—Judge Reid. December 10, 1910.

The Yatesville Banking Company brought suit against the Fourth National Bank, and laid two counts in the petition. The substance of these counts may be stated thus: In the first count it is alleged, that the plaintiff sues for the use of McNeice and certain other persons, whose names are set out, and that the defendant is liable to the plaintiff in the sum of \$3,612, because, on July 7, 1907, the plaintiff issued a certain cashier's check for that sum of money, payable to North Penn Iron Company; that on or about July 10, 1907, the defendant notified the plaintiff that it (defendant) had paid this cashier's check, upon the order of the payee, and it was held as a demand against the plaintiff; that on receipt of this notification the plaintiff paid to the defendant the sum of money above named, and received from the defendant the cashier's check, when, as a matter of fact, the defendant had not paid, and never has paid, the amount of the check to the payee or his order, the indorsement of the name of the payee being a forgery; and the usees named "have jointly paid unto the petitioner the sum of three thousand six hundred twelve dollars (\$3,612) to indemnify petitioner for the sum aforesaid paid defendant;" that the plaintiff has demanded of defendant the sum sued for, and payment thereof has been refused.

In the second count it is alleged, that the plaintiff sues for the use of the same persons; that the check was issued, the indorsement of the payee forged, and payment of it with this forged indorsement was requested by the defendant; that the plaintiff paid to the defendant the amount of \$3,612, receiving from the defendant therefor the original check, together with the defendant's guaranty in the following words: "Pay to the order of any bank or banker. Prior indorsement guaranteed. Fourth National

Bank of Atlanta, July 13, 1907. Chas. I. Ryan, Cashier;" that being induced by this guaranty and relying upon the same, the plaintiff paid the amount of the cashier's check to the defendant; that the guaranty has failed and the plaintiff has lost the sum of \$3,612 thereby; that "the usees have jointly paid unto petitioner the three thousand six hundred twelve dollars to indemnify petitioner for said loss." A copy of the check is set forth as an exhibit, and it appears that in addition to the indorsement, "North Penn Iron Co.," there were two other indorsements prior to the indorsement of the Fourth National Bank—those of John A. Stewart and Stewart & Davis.

The defendant filed a general demurrer, which the court sustained; and to this judgment the plaintiff excepts.

Scott & Davis, for plaintiff.

Rosser & Brandon, for defendant.

POWELL, J. (After stating the foregoing facts.) The demurrer was general, but the defendant in error alleges the following grounds why it should have been sustained: (1) that it is not alleged that reasonable notice of the forgery was given to the plaintiff, and that reasonable demand for the return of the money was not made; (2) that the cashier's check turned over to the plaintiff was not returned or tendered to the defendant before the suit was brought; (3) that it appears that the money paid out by the Yatesville Banking Company was repaid by the usees named in the action, before this suit was brought, and that the voluntary payment by the usees furnishes no right of recovery for their use.

1. Certain propositions are undisputed: (1) that the cashier's check stands as if it were a negotiable promissory note of the bank by which it was issued; (2) that the issuing bank stands thereto in the dual relation of drawer and drawee. It is also conceded (3) that ordinarily the bank issuing the cashier's check, and having paid it upon forged indorsement, would not be held chargeable with any notice that the indorsement was a forgery, and that ordinarily it could recover, from one to whom it had paid the money on the faith of the forged indorsement, the amount which it had thus improperly paid out on the check. The case before us, therefore, narrows to a decision upon the special points already mentioned

2. As to the first point really in issue: The law is that, where a person has paid a negotiable paper to another on a forged indorsement, and the latter is innocent of the forgery, it is incumbent upon the person so paying to give notice of the forgery to the other person within a reasonable time after discovery of the fact; and he may lose his right of action for failure to give the notice, provided that his laches in this respect has subjected the other to loss. What is reasonable notice in such a case is generally a question for the jury.

After stating a somewhat contrary doctrine, asserted by some of the courts, Daniel, in his work on Negotiable Instruments (5th ed.), § 1372, says: "But there is high authority for the more liberal, and, we think, wiser and juster doctrine that the demand for restitution may be made within a reasonable time after the forgery is discovered, and that the mere space of time is not important, provided it be clearly shown that the holder will be put to no more liability, trouble, or expense by a restoration than if it had been called for on the day of payment. Nor does the circumstance that there are genuine indorsers prior to the holder, but subsequent to the forged name, seem to us to alter the case. Their indorsement of the instrument being a warranty of its genuineness, they would not be entitled to notice, as it was not genuine in all respects; and, besides the right to sue them as indorsers, the holder, on being compelled to refund the money, could recover back the amount paid by him to his predecessor, and so on, until the instrument rested where the loss should fall."

We have no doubt that this states the correct doctrine. The defendant in such a case, having received from the plaintiff, to his use and benefit money to which he is not entitled, would primarily be subject to an action at law (generally to an action in the nature of an action for money had and received), to be brought at any time within the statute of limitations, but commercial usage, as well as a principle of natural justice, would require the person who had thus paid out the money not to remain quiescent when, by so doing, he would deprive the other person who, too, had been an innocent victim of the forgery of any reasonable means by which he might recoup his loss; and a failure to exercise reasonable diligence in giving this notice ought to and will deprive him of the right to maintain his action, if because of his failure in this re-

spect the loss does ensue. But two things (both failure to give the notice and loss on the part of the other person, occasioned thereby) should concur before this right of action, arising as it does *ex æquo et bono*, should be lost to the person who has been caused to pay the money improperly.

The duty to give the notice does not arise until the forgery has been discovered, and may be exercised then, or within a reasonable time thereafter. It does not appear from the petition in this case when the plaintiff discovered the forgery, nor when the demand for repayment was made upon the defendant, though it is alleged in general terms that it was demanded, or, as it is stated in one of the counts, was "formally" demanded. The petition would have been subject to special demurrer on the ground that this information was not given specifically, but the general demurrer raises no such question. Further, we are of the opinion that it is not necessary for the plaintiff in such a case to make it appear that his notice of the forgery and demand for repayment were given at such a time as that no loss to the defendant occurred from the failure, and that the petition would not be subject to general demurrer raising this question, unless the petition on its face affirmatively disclosed that loss had ensued. As Cowan, J., said, in *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 291: "I am not willing to concede that delay in the abstract, as seems to be supposed, can deprive the party of his remedy to recover back money paid under the circumstances before us." It would be an affirmative defense, which the defendant might set up by way of avoidance of liability, to say that this notice came at such a time and with such lateness that he was subjected to a loss which would not have ensued if it had been given timely. Such a defense is in the nature of a plea of recoupment, in which the defendant sets off damages ensuing from the plaintiff's neglect, against the damages which he caused to the plaintiff by reason of his false presenting of the paper.

3. As to the second reason asserted for the sustaining of the demurrer—that the plaintiff brought suit without first offering to return the cashier's check: The defendant in error cites two cases (*Coolidge v. Brigham*, 1 Metc. [Mass.] 547, and *Bassett v. Brown*, 105 Mass. 551). The last case cited is hardly in point, except in so far as it lays down the general doctrine that restoration is a condition precedent to rescission for fraud. The *Coolidge* case is

a leading case (frequently cited, but often distinguished) in support of the proposition that, where one party receives from another a paper which, though it is in some of its features a forgery, nevertheless has legal validity as against some of the parties thereto, there must be a return of the paper before there can be a rescission of the transaction in which it is involved. The point in that case is that such a paper is not one of those wholly valueless articles which need not be returned as a condition precedent to rescission. In that case the plaintiff, having taken, in payment for a bill of goods, a draft bearing a forged indorsement, but also bearing a genuine indorsement, attempted, upon discovery that his title to the instrument was infected with forgery, to bring assumpsit for the goods without returning the forged paper to the defendant from whom he obtained it. The court held that he could not maintain the action in this form; that he had no right to maintain assumpsit for the goods without rescinding the other transaction; and that that transaction could not be rescinded without the return of the paper, since the paper had some commercial value, irrespective of the fact that one of the indorsements thereon was a forgery. But the court before concluding the opinion pointed out that the defendant, by virtue of the indorsement which he had put upon the paper, had warranted that the previous indorsements were genuine, and upon this view of the case the court held that the plaintiff might sue the defendant upon this warranty without returning the paper, and allowed him to amend his declaration and to proceed accordingly. To quote the language of the court itself: "The plaintiff was at liberty to restore the note to the defendant, or to retain it and resort to his action on the warranty . . . A new trial, therefore, will be granted, with liberty for the plaintiff to amend his declaration by counting on the warranty; he paying the defendant his costs of the former trial and of the present term."

In the present case the suit was upon the warranty, not merely arising by implication, but expressly contracted for in the indorsement of the defendant upon which the plaintiff paid the money. This guaranty is essentially the cause of action set out in the second count, and, under the very authority of the chief case relied on by the defendant in error, the plaintiff had the right thus to sue without returning this paper. In the present case there is a

very plain reason why any other rule would be unjust, for upon this paper was the written evidence by which the plaintiff should support his cause of action; it was the written embodiment of the defendant's guaranty. If the defendant had offered to repay the money upon the surrender of this paper, it would have been the duty of the plaintiff to surrender it; but when the defendant refused to pay we know of no reason in law or in common sense why the plaintiff should be required to give up its evidence, even though by its retention of the paper it might deprive the defendant of that evidence which the defendant might need in order to recover from the previous indorsers. It must be kept in mind that if the defendant had discharged its obligation, under the circumstances, of repaying the money to the plaintiff, it would have been at once the duty of the plaintiff to put the defendant in possession of this evidence, which the defendant might need for its further protection.

4. As to the third objection—that it appears that the plaintiff has not suffered loss, because the persons named as usees have repaid to it the money which it paid out to the defendant: Counsel for the defendant cite a number of cases which all recognize the well-established rule that a person making a voluntary payment can not recover it; and these authorities would be more or less pertinent if these usees were suing the plaintiff and attempting to recover back the money, but just how it can affect the defendant's rights in this case we do not see. The allegation as to the acts of the usees and as to the fact that they had paid to the plaintiff an amount sufficient to indemnify it against loss is pure surplusage. The suit merely tests the right of the plaintiff to recover. The usees could not sue upon the guaranty, as they were not parties to it. "The mere fact that a plaintiff in his pleadings declares his intention of suing for the use of a third person does not raise any question as to the liability, either of the plaintiff or of the defendant, to such third person. The words declaring an intention to use the recovery for the benefit of another are, as to the defendant, harmless surplusage. He is not concerned in what disposition is to be made of the recovery." *Norcross Mfg. Co. v. Summerour*, 114 Ga. 156 (39 S. E. 870). Just what would have been the effect on the plaintiff's cause of action if these usees had unconditionally paid it the loss which the defendant's act had oc-

casioned, it is unnecessary for us to say; for it is not so asserted in the petition. It is merely alleged that these usees have paid over the amount of money represented by the check to the plaintiff bank to be held to indemnify it against loss. Why they paid it, or what connection they had with the transaction, is not disclosed. They may have been insurers; they may have been stockholders subjected to liability, or directors held for neglect in the matter, or what not; the record is silent, and we can not say. All we are called upon to say is that the petition does not disclose enough to show that they have deprived the plaintiff of its cause of action, so as to subject the petition to general demurrer.

In this connection, it is perhaps proper to notice, as a part of the general discussion of this question, that if the usees, from whatever motive, bought up the plaintiff's right of action and failed to secure such an assignment thereof as would be enforceable in a court of law, the proper method to bring suit would be for the present plaintiff to sue for the use of the usees, naming them; since their right of action in such a case could not otherwise be asserted in a court of law in this State. Under the practice here, where a transaction is such as to confer upon a party merely an equitable title to a chose in action, he can not sue thereon in his own name, but must sue in the name of the party in whom the right of action rests, and his own name may or may not be used as usee, accordingly as the plaintiff may elect.

After carefully considering the whole case, we have come to the conclusion that the general demurrer should not have been sustained. The defendant may have open to it one or more of the defenses which it has attempted to assert under the demurrer, but these should be set up by plea or answer, and demurrer is inadequate to raise them.

Judgment reversed.

2101. WILENSKY v. CENTRAL OF GEORGIA RAILWAY COMPANY.

RUSSELL, J. The Supreme Court (136 Ga. 889, 72 S. E. 418), in answer to the questions certified to it by this court, having held that a shipper who is both consignor and consignee can not maintain an action ex contractu against a carrier for the value of goods consigned to

it for shipment and not delivered, and which the carrier tendered at destination in a damaged condition, but refused to deliver without payment of the usual freight charges, notwithstanding the damage to the goods amounted to more than the freight charges, and the shipper demanded that the damages be offset against the freight bill, it follows that the trial judge did not err in sustaining the certiorari.

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Certiorari; from Fulton superior court—Judge Ellis. July 7, 1909.

Jesse M. Wood, for plaintiff.

Payne, Little & Jones, M. F. Goldstein, for defendant.

3162. WESLEY *v.* BOYD.

POWELL, J. The material question in the case is controlled by *Brandon v. Pritchett*, 126 Ga. 286 (55 S. E. 241). The plaintiff in error has requested that the question involved be certified to the Supreme Court, in order that a motion to review and overrule that case may be presented; but, since there appears no reasonable ground for a belief that the Supreme Court would recede from its former decision, the request is denied. See, also, the recent decision of the Supreme Court in *Kaigler v. Brannon*, 137 Ga. (72 S. E. 400).

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Action on contract; from city court of Griffin—Judge Clark presiding. December 16, 1910.

J. E. Drewry, as agent for G. B. Wesley, made a contract in writing, in September, 1909, for the sale of 15 bales of cotton to Douglas Boyd, at 11½ cents per pound, the bales to average 500 pounds each, and to be delivered in October, 1909. The writing recited a consideration of \$1, paid by Boyd, and was signed: "J. E. Drewry, for G. B. Wesley," and was also signed by Boyd. The suit is for damages on account of Wesley's refusal to deliver the cotton. The verdict is for the amount sued for,—the difference between the contract price and 14½ cents per pound, the alleged market price during October, 1909, with interest. Wesley moved for a new trial, on the grounds that the verdict was contrary to law and to the evidence; the motion was refused, and he excepted.

At the trial Drewry testified: "Some time in the latter part of August, 1909, Green B. Wesley came into my office with H. H. Bass. I am a warehouseman, and Mr. Wesley was trying to sell 15 bales of cotton for fall delivery, and Mr. Bass had offered to buy

it at 11½ cents. Mr. Wesley asked my advice about making the sale. I told him I thought he could do a little better, and advised him to wait a little. He then told me to sell for him 15 bales of cotton at a price above 11½ cents per pound, and make a contract for him to that effect, and not to let the price go below 11½ without selling. A few days later I sold the cotton for him to Mr. Douglas Boyd, and signed the contract which was sued on in this case. A short time after this, Mr. Wesley, the defendant, came to town, and I told him that I had sold the cotton for him and made a contract for him, and he said, 'I will sign it.' I said, 'I have already signed it for you; I sold it to Mr. Douglas Boyd and he has the contract in his office.' Mr. Wesley said it was 'all right.' No money was paid at the time of signing the contract. Mr. Wesley never gave me any written authority to sell the cotton, but he did give me verbal authority to sign—make a contract. I am not certain whether or not Mr. Wesley asked me, after the contract had been signed, as to when he was to deliver the cotton; but I think I may have told him that he could deliver it in October or November. . . . When he first authorized me to sell the 15 bales of cotton for him for fall delivery, he said nothing about any date of delivery, but just told me to sell the 15 bales of cotton, leaving that with me." The plaintiff testified that the defendant refused to deliver any cotton on the contract. It was also testified that cotton of the grade called for in the contract was worth 14½ cents on the first of November, and "was never less than that during the fall." No evidence was introduced by the defendant.

It was contended on the part of the defendant that the contract for the sale of the cotton was the contract of Drewry, and not of the defendant, and that Drewry had no authority to make it.

T. E. Patterson, for plaintiff in error, cited Civil Code (1910), §§ 3570, 3574, 3222, and the dissenting opinion in *Brandon v. Pritchett*, 126 Ga. 286, and requested that the question involved be certified to the Supreme Court, in order that a motion to review that case might be presented.

J. D. Boyd, Cleveland & Goodrich, contra, cited *Dozier v. McWhorter*, 117 Ga. 788-9; *Brandon v. Pritchett*, supra; *Smith v. Farmers Mut. Ins. Asso.*, 111 Ga. 739; *Colquitt v. Smith*, 76 Ga. 709; *Brown v. Colquitt*, 73 Ga. 59.

3242. AVERY & CO. v. THOMASON & SON.

The errors assigned as to rulings upon the trial and as to charges of the court are not well taken. There is sufficient evidence to support the verdict, subject only to a small error in calculation, which may be cured by direction given in connection with the judgment of this court.

DECIDED NOVEMBER 7, 1911.

Complaint; from city court of Bainbridge—Judge Cranford.
January 21, 1911.

J. C. Hale, for plaintiffs.

R. G. Hartsfield, for defendants.

POWELL, J. According to the allegations of the defendants' plea, they owed the plaintiffs only \$4.66, and for that sum the jury rendered their verdict—the verdict being plainly intended as a finding upon this plea. There are a number of assignments of error in the record, relating to rulings of the court upon the evidence and to instructions to the jury; but no material error in this respect appears. It does appear, however, that the calculation by which the amount of \$4.66 was arrived at is incorrect. The plea shows this on its face. The amount really left due upon the note was \$10.68, and for this sum a verdict against the defendants was demanded. The whole question involved in the trial was where a certain credit of \$300 should have been placed, and, after placing this credit as claimed by the defendants, there was still due on the note \$10.68. Ordinarily this court has no power by direction to increase the size of a verdict; but inasmuch as, under the pleadings, a verdict of \$10.68 could have been directed (since, when the defendants' plea is properly construed, it admits a liability of that amount), and as the verdict has properly settled the only issue in the case, we do give direction that the trial judge modify the judgment in the lower court, so as to allow the plaintiffs a recovery of \$7.36 principal \$2.35 interest to judgment, and 97 cents attorney's fees, with interest thereon from the date of the trial.

Judgment affirmed, with direction.

3219. SOUTHERN RAILWAY CO. v. BROWN.

POWELL, J. The evidence seems to preponderate against the verdict; but as the charge of the court was free from error, and as there was some evidence to support the verdict, the judgment is *Affirmed.*

DECIDED NOVEMBER 7, 1911.

Appeal; from Franklin superior court—Judge Meadow. January 5, 1911.

A. G. & Julian McCurry, W. R. Little, George L. Goode, for plaintiff in error.

S. B. Swilling, Dorough & Adams, contra.

3258. ARNOLD *et al.* v. VIRGINIA-CAROLINA CHEMICAL CO.

HILL, C. J. The positive evidence proved that all the sacks of guano sold to the defendants were branded and tagged and came fully up to the requirements of the statute. The evidence to the contrary was negative in character and without probative value. No error of law appears, and the verdict as directed was demanded by the evidence. The case is controlled by the decision of the Supreme Court in *Holt v. Navassa Guano Co.*, 114 Ga. 666 (40 S. E. 735). *Judgment affirmed.*

DECIDED NOVEMBER 7, 1911.

Complaint; from city court of Waycross—Judge McDonald. February 6, 1911.

Allen B. Spence, James R. Thomas, for plaintiffs in error.

Patterson & Copeland, Wilson, Bennett & Lambdin, contra.

3297. HUNNICUTT v. GRAVES.

HILL, C. J. 1. The law applicable to the issues made by the evidence in this case was fully stated in the opinion of this court when the case was here before. *Graves v. Hunnicutt*, 8 Ga. App. 99 (68 S. E. 558).

2. Where a case has been before this court on assignment of error to a judgment awarding a nonsuit, and the judgment has been reversed because in the opinion of the court there was some evidence which, under the law, would have authorized a verdict for the plaintiff, and on the second trial the evidence for the plaintiff is substantially the same as it was on the first trial, and the evidence in behalf of the defendant goes only to the extent of raising a conflict on issues of fact, and no error of law is complained of, no question is presented for decision in this court, and the verdict for the plaintiff will not be disturbed.

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Complaint; from city court of Atlanta—Judge Reid. February 7, 1911.

C. L. Pettigrew, for plaintiff in error.

George Gordon, Burton Cloud, contra.

3318. *HYLAND CHEMICAL CO. v. GODDARD.*

HILL, C. J. This writ of error relates to a judgment overruling a demurrer to a plea. There was no final judgment, and the case is still pending in the lower court. Under the repeated rulings of this court and the Supreme Court, the writ of error will be dismissed as premature. Civil Code (1910), § 6138; *Case Threshing Machine Co. v. Hodges*, 9 Ga. App. 722 (72 S. E. 189), and cases there cited.

Writ of error dismissed.

DECIDED NOVEMBER 7, 1911.

Scott & Davis, C. G. Mills Jr., for plaintiff.

Cleveland & Goodrich, for defendant.

3322. *JAMES v. THE STATE.*

1. The act of the General Assembly approved August 12, 1910 (Acts 1910, p. 134), making it unlawful to have or carry about the person any pistol or revolver, without first obtaining license from the ordinary, is held by the Supreme Court to be constitutional, in *Strickland v. State*, 137 Ga. 1 (72 S. E. 260).
2. The boundary line between the States of Georgia and South Carolina is that agreed on by the commissioners of both States at the convention of Beaufort on April 28, 1787. This boundary line, as then fixed and established, was not altered by the fact that subsequently the United States government, in the course of its work to improve the navigation of the Savannah river, changed the location of the main current or channel of the river; but it remains where the main channel or current of the river flowed naturally when the boundary line was originally fixed and established.
3. The evidence shows that the offense was committed at a point on the bridge which connects Georgia with South Carolina, and on the Georgia side of the main current or channel of the river, as said current or channel was located when it was originally fixed and established as the boundary line between the two States. The venue was thus fully proved.

DECIDED NOVEMBER 7, 1911.

Accusation of carrying pistol without license; from city court of Richmond county—Judge W. F. Eve. February 27, 1911.

E. Foster Brigham, B. B. McCowen, Isaac S. Peebles Jr., for plaintiff in error.

James C. C. Black Jr., solicitor, contra.

HILL, C. J. George James was convicted of a violation of the act of the General Assembly (Acts 1910, p. 134) making it a misdemeanor for one to carry on his person a pistol without having procured a license as provided by the act. The record raised two questions: (1) as to the constitutionality of the act upon which the indictment was framed; and (2) whether the jurisdictional fact of venue was proved.

The first question was settled by the Supreme Court in the case of *Strickland v. State*, 137 Ga. 1 (72 S. E. 260), on certificate from this court for instructions.

The evidence necessary to determine the question of venue, briefly stated, is as follows: James was arrested by a police officer of the city of Augusta on the bridge over the Savannah river, known as the "Center street bridge;" this bridge connecting the States of Georgia and South Carolina. At the time of the arrest James had a revolver on his person and had not procured a license to carry it. The arrest was made about the middle of the bridge, and at a point which would be in the State of South Carolina if the present channel of the Savannah river is to be accepted as the boundary line between these two States; but if the boundary line between the two States is the current or main thread of the channel of the river as originally fixed and determined by the treaty of Beaufort as the boundary line between them, then the offense was committed in the State of Georgia. So the question which must determine the venue in the present case is dependent upon the location of the boundary line between the States of Georgia and South Carolina as above indicated. The evidence further showed that, for a distance of about a mile above and below where the Center street bridge crosses the river, the United States government, by a series of training dikes, has diverted the natural channel of the river from the South Carolina side to the Georgia side, for the purpose of improving the navigation of the river on the Georgia side at the city of Augusta, and that before the building of these dikes the channel of the river was 600 or 700 feet from the Georgia side, and 200 or 300 feet from the South Carolina side, and was gradually changing to the Carolina side, but since the building

of the dikes the current of the river is only 250 feet from the Georgia side. In other words, the building of the training dikes by the United States government has changed the natural current of the river, so that, instead of being 600 to 700 feet from the Georgia side, as formerly, it is now only 250 feet from the Georgia side. According to the treaty of Beaufort between the States of Georgia and South Carolina, agreed on by the commissioners of both States on the 28th of April, 1787, the current or main thread of the channel of the Savannah river was established as the boundary between the two States. Political Code (1910), § 16; Hotchkiss's Statutes, §§ 913-917; *Simpson v. State*, 92 Ga. 41 (17 S. E. 984, 22 L. R. A. 248, 44 Am. St. R. 75). The boundary line so fixed was intended to be a permanent boundary line between the two States, subject to be changed only by the subsequent joint action of the two States.

There is no Georgia decision exactly in point, but the question here involved has been before the Supreme Court of the United States in several cases, and that august tribunal has clearly laid down the rule by which the question in this case can be determined. In the case of *State of Nebraska v. State of Iowa*, 143 U. S. 369 (12 Sup. Ct. 396, 36 L. ed. 186), in a very learned opinion by Justice Brewer, it is held that where the boundary between States or nations is, by prescription or treaty, found in running water, accretion, no matter to which side it adds ground, leaves the boundary still the center; that avulsion has no effect on the boundary, but leaves it in the center of the old channel. In other words, an accretion on an ordinary river would leave the boundary between two States the varying center of the channel, and an avulsion would leave the boundary the center of the abandoned channel. See, also, a very elaborate opinion by Attorney-General Cushing, in which the subject is very exhaustively considered and the above distinction made; also the general subject treated in Gould on Waters, § 159, and Angell on Water Courses, § 60. In the case of *Missouri v. Nebraska*, 196 U. S. 23 (25 Sup. Ct. 155, 49 L. ed. 372), which was a case to determine the boundary line between the two States and to define what was the center of the main channel of the Missouri river, it was held that accretion is the gradual accumulation by alluvial formation, and, where a boundary river changes its course gradually in such manner, the

boundary remains the varying center of the channel, but that avulsion is a rapid change in the course or channel of a river, and does not work any change in the boundary, which remains as it was in the center of the river, although no water may be flowing therein. These principles apply alike whether the river is a boundary line between private property or between States and nations. Now, the boundary line between the States of Georgia and South Carolina, as fixed by the treaty of Beaufort in 1787, was the current or main thread of the Savannah river between designated points. There is no evidence that this channel has been changed, either by the gradual process of accretion or by the sudden and violent process of avulsion.

It is insisted, however, by learned counsel for the plaintiff in error, that this current or main thread of the channel has been changed by the work of the United States government for the purpose of improving the navigability of the Savannah river near the city of Augusta, and that the channel of the river is now located much nearer the Georgia side, and that this change in the channel or current of the river changes ipso facto the boundary line between the two States. In support of this contention it is said that the constitution of the United States (art. 1, section 8, par. 3) gives to the Federal government control of all navigable rivers between States, and that it therefore follows that any change in the channel or current of a navigable river is a lawful change, and thereafter the channel of the river is fixed, and the boundary line follows this current or channel. Unquestionably the United States government, by the provision of the constitution above quoted, has control over navigable rivers for the purpose of improving navigation; but the exercise of this right can not in any sense affect the boundary lines as fixed by treaties, or law, or prescription, between the States, or between riparian owners. Where grants of land border on navigable streams, no change which the United States government might make in the course of such stream could affect in any way the rights of the riparian owners as fixed and determined by deeds or prescription, and, of course, where a river is made a boundary line between two States, if the course of the river is changed or diverted by the United States government in the exercise of its authority to improve navigation, the change in the course of the river would not affect the boundary line, but

the boundary line would remain as fixed by law, treaty, or prescription. The legal effect of the act of the government in changing the main channel or current of the river is analogous to a change caused by avulsion, and not by accretion. The treaty of Beaufort, as therein stated, settled and adjusted the boundary differences between the States of Georgia and South Carolina, and established a fixed and permanent boundary line between them, and this boundary line was distinctly declared to be the current or main thread or channel of the Savannah river between the two States, between designated points on said river. This boundary line, so fixed and established by authority of the two sovereign States, could not be changed or affected by any act of the Federal government in pursuance of its power over navigable rivers. Indeed, we do not think that this right to regulate and improve navigable rivers has any relation whatever to the question of boundary lines.

We conclude, therefore, that the existing boundary line between the States of Georgia and South Carolina is as fixed and established by the treaty of Beaufort; and this being true, under the evidence, the offense in this case was committed within the State of Georgia, and the venue was sufficiently shown.

Judgment affirmed.

3323. BRIGHT *v.* THE STATE.

An indictment for simple larceny, charging that the defendant, on the 19th day of October, 1910, "in the county aforesaid, of the personal goods of W. T. Lockett then and there being found, to wit, 100 pounds of seed cotton, of the value of \$10," did take, etc., is insufficient, as against a special demurrer calling for a more definite description of the property alleged to have been stolen.

DECIDED NOVEMBER 7, 1911.

Indictment for larceny; from city court of Albany—Judge Crossland. February 14, 1911.

R. J. Bacon, Ben T. Burson, for plaintiff in error.

RUSSELL, J. The only question raised by the bill of exceptions is the sufficiency of the indictment, under which the defendant was tried and convicted, as against the special demurrer filed thereto. The material portions of the indictment are as follows: "On the

19th day of October in the year of our Lord one thousand nine hundred and ten, in the county aforesaid, of the personal goods of W. T. Lockett then and there being found, to wit, 100 pounds of seed cotton, of the value of \$10." The defendant demurred, on the ground that the property alleged to have been stolen was not described with sufficient definiteness and particularity.

We are of the opinion that the point is good. Where timely demand is made by special demurrer, the defendant is entitled to have such a definite and particular description of the property as will enable him to know the exact transaction in which the State claims he violated the law. In some way the particular property alleged to have been stolen must be described. It is not sufficient for the indictment merely to charge the defendant with having stolen a chair, a shovel, a table, a watermelon, or a pocket-knife. The marks, quality, or kind of the property must be incorporated in the description, or the transaction in some way individualized. Merely to charge the defendant with having stolen "seed cotton," without even saying whether it is long or short staple, or without in any way informing him of the locality from which it is claimed he stole the cotton, is too vague, general, and indefinite to withstand a timely special demurrer. *Roberts v. State*, 83 Ga. 369 (9 S. E. 675); *Melvin v. State*, 120 Ga. 490 (48 S. E. 198); *Ayers v. State*, 3 Ga. App. 305 (59 S. E. 924). *Judgment reversed.*

3330. TURNER v. THE STATE.

1. There was no error in overruling the demurrer to the indictment.
2. In a prosecution under section 513 of the Penal Code of 1910, it is unnecessary to prove ownership of the railroad-track, if possession of it consistently with the allegations of the indictment be shown.
3. Intent and purpose to wreck a train was sufficiently shown by evidence that the defendant placed an iron bar, 3½ feet long, weighing 20 pounds, on a railroad-track, laying the small end on the iron rail and the other end against the cross-tie, a few moments before a passenger-train was due, that the track at this point was on an embankment, and that the defendant then went across into a field and hid behind some bushes.

DECIDED NOVEMBER 7, 1911.

Indictment for attempt to wreck train; from Greene superior court—Judge Walker. March 11, 1911.

James Davison, Miles W. Lewis, for plaintiff in error.

Joseph E. Pottle, solicitor-general, *Joseph B. & Bryan Cumming, Noel P. Park*, contra.

RUSSELL, J. 1. The defendant was indicted for a violation of section 513 of the Penal Code (1910). The language of the indictment conforms substantially to that used in the statute. The instrument used was alleged to be "an iron article the exact character of which is to said grand jurors unknown." The manner of making the attempt was alleged to be by placing the iron article on the railroad of the Georgia Railroad & Banking Company. The defendant filed a special demurrer to the indictment, because the train which it was claimed the defendant attempted to wreck was not described, and because the means or manner of the attempt was not set forth with sufficient particularity. We think the indictment is sufficient. It is not necessary to describe the train with particularity; for that does not enter into the gravamen of the crime. An attempt to wreck any train is a crime; and, as the offender may not know what train he will wreck, the State is not required to show what train he intends to wreck. The defendant was informed by the indictment that he was charged with an attempt to wreck a train on the railroad-track of the Georgia Railroad & Banking Company. This was sufficient to notify him of the gist of the charge against him. We likewise think both the means and the manner are sufficiently alleged; it being stated that the defendant placed an iron article on the railroad-track.

2. One of the grounds of the motion for a new trial complains that a witness for the State was allowed to testify that the railroad-track was owned by the Georgia Railroad & Banking Company, over the defendant's objection that the record title was the best evidence. Ownership of the track would not necessarily have to be evidenced by a written record title; and, it not appearing to the court that there was any such title, it would seem that no proper foundation for the objection had been laid. Furthermore, the evidence objected to was immaterial. Under section 513 of the Penal Code, the ownership of the track is immaterial, it being entirely sufficient that the track was in the possession of a railroad company. *Adkins v. State*, 115 Ga. 582 (41 S. E. 987).

3. It is unnecessary to elaborate the third headnote. The charge was eminently fair, and the verdict fully authorized.

Judgment affirmed.

3340. PATTEN *v.* THE STATE.

Motions for continuance, made at the term at which the indictment is found, while addressed to the discretion of the court, stand upon a different footing from such motions made at a subsequent term. In such cases the discretion of the court should be liberally exercised in favor of a fair trial, no less than that the trial should be speedy, and every facility should be afforded a defendant for presenting his defense as fully as he might be able to do were the case tried at a subsequent term. Reasonable opportunity for the defendant to prepare his defense should not be sacrificed in the interest of speed.

DECIDED NOVEMBER 7, 1911.

Indictment for sale of liquor; from Ware superior court—Judge Parker. February 11, 1911.

John J. Moore, for plaintiff in error.

M. D. Dickerson, solicitor-general, contra.

RUSSELL, J. On December 6th a presentment was returned, charging the defendant with a violation of the prohibition law. Fifteen days later, to wit, December 21st, he was put upon trial. The man to whom it was claimed he had sold the liquor was named Best. The defendant filed a motion for a continuance, in which it was shown that, on the day after the presentment was returned, his attorney had a subpoena issued for Best, and placed it in the hands of the sheriff for service. Two or three days later it was learned that Best had left the county, and was in Savannah. The defendant's attorney immediately had another subpoena issued, which was placed in the hands of the sheriff of Chatham county, who located Best, and requested that \$5 be sent for his expenses, stating that Best would leave on the next train after its receipt. The money was sent, and, Best failing to arrive within two or three days thereafter, the defendant's attorney, on December 15th, had an attachment issued for him, but he had not been located. Best was only temporarily absent from the county, and the defendant expected to have him present at the next term of the court. Best would swear that the defendant did not sell him any liquor; that several days before the arrest the defendant made a trip to Jacksonville, Florida, on business, and Best gave him some money with which to purchase a pint of whisky; that the defendant did not in any way get or retain any benefit or profit out of the transaction, and acted purely and simply as the agent of Best in purchasing the whisky at Jacksonville. It was further shown that Best was the

only witness to these facts. These facts were substantially undisputed, except that the State proved that an attachment had been issued from a justice's court against Best, indicating that he was removing permanently from the county.

It will be seen that if the jury should credit Best's testimony, the defendant was entirely innocent. The evidence relied on by the State was circumstantial, and the testimony sought to be elicited from Best presented a theory strongly indicating innocence. As between a speedy and a fair trial, speed should yield to fairness. The defendant was put upon trial just 15 days after he was accused, and we think has been denied his right to have presented to a jury of his peers testimony which was in all probability accessible, and which, if believed, would have shown his innocence. While we recognize that continuances are matters resting largely in the discretion of the trial court, still, at the first term, that discretion should be liberally exercised in favor of a fair trial, and every facility should be afforded the defendant for presenting his defense as fully as he might be able to do were the case tried at a subsequent term. *Brooks v. State*, 3 Ga. App. 458 (60 S. E. 211). The interests of justice would not have suffered by giving the defendant the right to have the jury hear the testimony of the only person who really knew whether he was guilty or innocent. The evidence against the defendant is weak, and if his full defense had been heard the result might have been different.

Judgment reversed.

3349. CARR v. THE STATE.

There was no error in overruling the general demurrer; and the special demurrer was not well taken.

DECIDED NOVEMBER 7, 1911.

Indictment for embezzlement; from Jeff Davis superior court—Judge Conyers. March 3, 1911.

The indictment charged that on the 14th day of February, 1911, C. D. Carr, "being a servant and employee employed in a station and office of Georgia and Florida Railway, a corporate body in the State of Georgia, to wit, station agent at Hazlehurst in said State and county of said railway, and, as such servant, agent, and em-

ployee, having collected for said railway, from sale of tickets and for freight charges, certain sums of money, the property of said railway, amounting to \$1,035.05, of the value of \$1,035.05, said sums of money collected on the 12th day of December, 1910, and on dates from then up to the 14th day of February, 1911, did embezzle, steal, secrete, and fraudulently carry away the money collected as aforesaid described, contrary to the laws of said State," etc.

The demurrer was on the following grounds: (1) The allegations in the indictment constitute no offense, "for the reason that the law for embezzlement in said State under which the defendant is indicted is illegal and void, and is not a proper legal statute or law of said State." (2) The indictment is based on section 186 of the Penal Code, which is as follows: "Any officer, servant, or other person employed in any department, station, or office in any bank or other corporate body in this State, or any president, director, or stockholder of any bank or other corporate body in this State, who shall embezzle, steal, secrete, or fraudulently take and carry away any money, paper, book, or other property or effects, shall be punished," etc.; which code section is illegal and void, and contrary to the spirit, intendment, and reason of the constitution and public laws of said State, in that it is thereby sought to make the acts designated constitute the crime of embezzlement without regard to whether the thing taken is the property of the corporate body referred to, or of some other person, and disconnected with the corporate body; also, in that the said code section seeks to make the crime of embezzlement complete without regard to any fiduciary relation between the person taking and the property taken and the owner; and any statute which seeks to make that embezzlement which is not founded upon a fiduciary relation is illegal and in violation of the spirit and meaning of the constitution and public laws of the State and of the public policy of the government. (3, 4) The third and fourth grounds are, in substance, that the said code section is class legislation, for the reasons stated above. (5) The indictment does not allege with sufficient particularity the date, the amounts, and from whom the collections were made; the allegations are too vague, indefinite, and uncertain to apprise the defendant of the specific amounts constituting the \$1,035.05 alleged to have been collected.

The demurrer was overruled generally.

W. W. Bennett, J. C. Bennett, for plaintiff in error.

J. H. Thomas, solicitor-general, contra.

RUSSELL, J. Carr was indicted under section 186 of the Penal Code of 1910. The indictment is substantially in the language of the code section, but the defendant's general demurrer raises the contention that the statute itself is illegal, void, and unconstitutional. Nowhere does the demurrer refer to any provision of the constitution of which the statute is violative, and this is the only way in which a decision of the question can properly be invoked. It does not appear clearly from the order whether the judge passed on the special demurrer, but it is without merit.

Judgment affirmed.

3361. NERO v. THE STATE.

RUSSELL, J. The only assignment of error in this case is based on the claim that the act of 1910 (Ga. Laws 1910, p. 134), regulating the carrying of arms, is unconstitutional. This question was decided adversely to the plaintiff in error, in the case of *Strickland v. State*, 137 Ga. 1 (72 S. E. 260).

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Accusation of carrying weapon without license; from city court of Macon—Judge Hodges. March 25, 1911.

Napier & Maynard, for plaintiff in error.

W. J. Grace, solicitor-general, contra.

3364. TYUS v. THE STATE.

RUSSELL, J. The decision in this case is controlled by the ruling of this court in *Twilley v. State*, 9 Ga. App. 435 (71 S. E. 587).

Judgment reversed.

DECIDED NOVEMBER 7, 1911.

Accusation of gaming; from city court of Sparta—Judge Moore. March 14, 1911.

T. M. Hunt, R. H. Lewis, for plaintiff in error.

R. L. Merritt, solicitor, contra.

3367. BRANTLEY v. THE STATE.

1. The evidence amply authorized the verdict of guilty.
2. Under the rulings of the Supreme Court, it was not reversible error for the trial judge to leave the bench during the argument of counsel and step into an adjoining room for a few moments without the consent of counsel; it appearing that he was all the time within hearing, and that no motion for mistrial was made, nor any other objection urged at the trial.

DECIDED NOVEMBER 7, 1911.

Certiorari; from Fulton superior court—Judge Bell. March 29, 1911.

John Y. Smith, for plaintiff in error.

Hugh M. Dorsey, solicitor-general, *Lowry Arnold*, solicitor, contra.

RUSSELL, J. 1. The defendant was convicted of assault and battery, in the criminal court of Atlanta. He took the case to the superior court by certiorari; the certiorari was overruled, and he excepts to that judgment.

From the evidence it appears that the defendant's brother, several days before the alleged assault, had been arrested for selling intoxicating liquor. The defendant and the brother met the policeman who had made the arrest, and the defendant caught him by the arm and said: "What in the hell did you mean by turning up my brother?" The defendant and the brother then caught the policeman by each arm, and the three walked down the street until they came to a street corner, near which there is a dark underpass. While they were walking down the street, several other boys were in the rear, yelling, "Kill him! Hit him! Knock him in the head!" When the corner was reached the policeman refused to go any farther, whereupon he was struck in the head with some hard substance like knucks. The blow came from the rear, and the policeman could not tell who hit him. At the trial in the recorder's court the defendant admitted that he did it. In his statement during the present trial he failed to deny any of the facts stated above, except the actual hitting, and explained that the reason he took all the blame in the recorder's court was because he thought the fine there imposed would be the end of the matter. Under the undisputed evidence the defendant was guilty. The jury were authorized to infer that seizing the policeman's arm in anger (as evidenced by the language used) was an assault and

battery. Furthermore, even if the defendant did not strike the blow, he was so connected with it as to be an accomplice, and as such equally guilty with the principal offender for the misdemeanor there committed.

2. The only other error complained of in the petition for certiorari is that during the argument to the jury trying the case the judge of the criminal court absented himself from the court-room for a few moments without the consent of counsel and without suspending the trial. He was all the time within hearing of what was taking place in the court-room. We do not approve the judge's conduct, but neither the defendant nor his attorney made any objection at the time. It is undoubtedly true that the trial should be had in the immediate presence of the judge, and when he wishes to leave the bench for any purpose, even for the briefest space of time, he should suspend the trial. As Judge Bleckley says: "His immediate presence tends to preserve the legal solemnity and security of trial, and upholds the majesty of law." *Hayes v. State*, 58 Ga. 35, 49. In the case of *Horne v. Rogers*, 110 Ga. 362, 370 (35 S. E. 715, 49 L. R. A. 176), Justice Cobb made a thorough review of all the cases on the subject and said: "The mere absence of the judge during the progress of the trial, when no objection is made, will not necessarily require the granting of a new trial, when the absence is only for a few moments and for a necessary purpose; and, in order for such absence to become reversible error, it must appear, not only that objection was made to the judge's failure to suspend the trial, but that the absence of the judge resulted in some harm to the losing party. . . . If it were an open question, we would hold that the presence of the judge at all stages of the trial is absolutely necessary to its validity, and that the absence of the judge from the trial without suspending the same for any length of time, no matter how short, or for any purpose, no matter how urgent, would vitiate the whole proceeding, whether objection was made by the parties interested or not, and whether injury resulted to any one or not. The judge is such a necessary part of the court that his absence destroys the existence of the tribunal, and public policy demands that the tribunal authorized to pass upon the life, liberty, and property of the citizen should be constituted during the entire trial in the manner prescribed by law. The great weight of authority is in harmony

with this view. The very definition of trial carries with it the idea of the superintendence of a judge."

In view of the fact that the evidence in this case practically demands a verdict of guilty, and that no objection was made to the irregularity at the time, the conduct of the judge is not cause for a new trial.

Judgment affirmed.

3373. COWART, by next friend, v. WAYCROSS ELECTRIC LIGHT & POWER Co.

POWELL, J. The court erred in granting a nonsuit.

Judgment reversed.

DECIDED NOVEMBER 7, 1911.

Action for damages; from city court of Waycross—Judge McDonald. March 18, 1911.

James R. Thomas, James W. Poppell, A. B. Spence, for plaintiff.
J. L. Sweat, for defendant.

3376. BLOCKER v. IRVINE.

POWELL, J. The only assignment of error is that the court erred in overruling a general demurrer to the petition. As originally drawn the petition was subject to demurrer. Before the demurrer was passed on, the court allowed an amendment fully curing the deficiency. The only question argued in this court is whether the court erred in allowing the amendment. The assignment of error is inadequate to raise this question.

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Trover; from city court of Macon—Judge Hodges. March 15, 1911.

B. J. Fowler, for plaintiff in error.

R. S. Wimberly, contra.

3408. MACON, DUBLIN & SAVANNAH RAILROAD Co. v. WARNOCK.

POWELL, J. The evidence, though strongly preponderating against the verdict, is not in such condition as to authorize this court to reverse the judgment; no error of law being shown.

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Certiorari; from Montgomery superior court—Judge Martin. March 30, 1911.

Minter Wimberly, W. L. Wilson, Akerman & Akerman, for plaintiff in error.

William B. Kent, contra.

3412. ODUM *v.* THE STATE.

RUSSELL, J. The evidence showing that the defects in the horse traded were patent, and failing to show that the prosecutor was deceived by any false representation knowingly made by the defendant, the conviction of cheating and swindling is contrary to law. *Rainey v. State*, 94 Ga. 599 (19 S. E. 892). *Judgment reversed.*

DECIDED NOVEMBER 7, 1911.

Accusation of cheating and swindling; from city court of Lumpkin—Judge Hickey. March 24, 1911.

G. Y. Harrell, for plaintiff in error.

T. T. James, solicitor, contra.

3413. ALEXANDER *v.* THE STATE.

RUSSELL, J. 1. The evidence authorized the verdict.

2. There was no error, in view of the counter-showing made by the State, in refusing to grant a new trial because of the alleged newly discovered evidence. *Judgment affirmed.*

DECIDED NOVEMBER 7, 1911.

Accusation under Penal Code (1910), § 729; from city court of Tifton—Judge R. Eve. April 8, 1911.

R. D. Smith, for plaintiff in error.

James H. Price, solicitor, contra.

3417. CARSWELL *v.* THE STATE.

RUSSELL, J. 1. The court did not err in charging the law of voluntary manslaughter. *Gann v. State*, 30 Ga. 67.

2. The defendant can not complain that the court gave in charge to the jury section 71 of the Penal Code (1910). This instruction was manifestly favorable to the accused. *Judgment affirmed.*

DECIDED NOVEMBER 7, 1911.

Indictment for murder—conviction of manslaughter; from Laurens superior court—Judge Martin. April 12, 1911.

Adams & Flynt, John R. Cooper, for plaintiff in error.

E. D. Graham, solicitor-general, contra.

3433. WALKER v. CITY OF ATLANTA.

The evidence is extremely weak and unsatisfactory, but this court can not say, as a matter of law, that the witness against the defendant committed perjury.

DECIDED NOVEMBER 7, 1911.

Certiorari; from Fulton superior court—Judge Bell. March 29, 1911.

John A. Boykin, for plaintiff in error.

J. L. Mayson, W. D. Ellis Jr., contra.

RUSSELL, J. Tom Adams, a negro, who had been to the stockade three times, was employed by the city detective department to "turn up blind tigers." He was paid \$2 a day, and spent the money faster than he made it. He went to a meat market where Briscoe Gaines was working, and offered to buy some liquor. Briscoe took the 50 cents offered, and went off and returned in about 15 minutes with a half pint of corn whisky, which he gave to Tom Adams. Adams, Briscoe, and several other negroes took a drink out of the bottle, and then Tom turned the bottle over to the detective, with the statement that he had bought the liquor from Briscoe Gaines. The detective then arrested Briscoe, who, after his arrest, stated that he had purchased the whisky from the defendant, Will Walker, paying him 40 cents therefor. Thereupon he was released. Will Walker was arrested, and charged with keeping intoxicating liquor on hand for the purpose of illegal sale. On the trial, in addition to the above facts, it appeared that Briscoe Gaines had been sent to the stockade seven times, and that, immediately after he reported to the detectives that he had purchased the whisky from the defendant at his home, a search was made of the home, but no liquor found there. The defendant denied selling the liquor, and claimed that he knew nothing about the transaction. The recorder imposed on him a fine of \$100, or 30 days in the stockade.

It thus appears that the only evidence against the defendant is the testimony of a negro confessedly guilty himself (inasmuch as he admits he made a profit of 10 cents in the transaction), who, after he implicated the defendant, was sent to the stockade, and who had previously been sent to the stockade seven times. If we were jurors, charged with the sworn duty of acquitting unless satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the accused, we would unhesitatingly return a Scotch verdict of "not proven." But we can not say the defendant has been illegally convicted. The recorder had the better opportunity of testing the credibility of the witness and of judging as to the truth of the transaction.

Judgment affirmed.

3434. BOATRIGHT v. THE STATE.

RUSSELL, J. 1. There was no error in striking the plea to the jurisdiction.

The mere fact that there were irregularities in the justice's court during the commitment trial would not deprive the city court of jurisdiction to try the case, on accusation duly made. If the commitment was irregular or illegal, the defendant might have raised such questions by habeas corpus, but could not, after having been bound over and having given bond, plead them to the jurisdiction of the city court.

2. The evidence showed that the defendant, an employee of a railway company, was seen to leave an express car with a package and go to an old passenger car, where he left it. Investigation disclosed that a barrel of shad, contained in the express car, had been opened with a knife. The defendant was watched, and was seen to return to the passenger car and get the package and start toward home. The express agent overtook him, and, after defendant's denial that the package contained fish, broke it open and found two shad. The agent went to every fish dealer in town, and none of them had any such fish in stock on that day. *Held*, the corpus delicti was properly proved, and the verdict of guilty was authorized.

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Accusation of larceny; from city court of Sandersville—Judge Jordan. April 15, 1911.

Goodwin & Wood, for plaintiff in error.

J. E. Hyman, solicitor, contra.

3439. CARSWELL *v.* THE STATE.

1. Where a killing took place in front of a store and across the street from it, a statement of the accused, after he had walked away from the scene of the difficulty and into the store, in which he voluntarily said to the bystanders, "Men, what I done, I had to do it," was not improperly rejected as not being part of the *res gestæ*, on the ground that it was not free from suspicion of device or afterthought.
2. Under the evidence, there was no error in failing to charge the law of involuntary manslaughter.
3. The judge was justified in not permitting counsel for the defendant to use, in his argument before the jury, a gun which had not been introduced in evidence.
4. When the excerpt upon which error is assigned is considered in connection with the judge's charge as a whole and with the facts of the case, it appears that there was no error in the charge on provocation by words, threats, and contemptuous gestures.
5. The request to charge was not adjusted to the evidence.

DECIDED NOVEMBER 7, 1911.

Indictment for murder; from Laurens superior court—Judge Martin. April 12, 1911.

Robert Carswell was convicted of voluntary manslaughter. From the evidence it appears, that on his going into the store of Lee Royal, the deceased, the latter charged him with having been "dodging around" his (Royal's) house after his twelve-year-old daughter. The defendant denied the charge, but Royal said that if he heard of it again he would kill the defendant. As the quarrel progressed, there was mutual cursing. As to what happened after this, the evidence is in conflict. The defendant and his witnesses say that he was ordered out of the store, and went directly across the street to another store, and was sitting on the porch of that store, when Royal, with a breech-loading shotgun, went out of the side door of his store, and around towards the back of the other store, slipped up on the defendant unawares, cocked the gun, and, pointing it at the defendant's head, said, "Don't you move;" that the defendant grabbed the barrel of the gun and endeavored to wrest it from Royal's hand, and, in the scuffle that followed, shot Royal three times with a pistol; two of the wounds being of fatal character. After the three pistol-shots, a gun was fired, and the shot from it took effect in Royal's hip. This wound was not necessarily of fatal character. According to the defendant's statement, the gun was discharged either by him or by Royal in the scuffle.

A few moments before his death Royal made a statement, to the effect that after the quarrel had begun, and while he was standing in the door of his store with the gun under his arm, the defendant's brother grabbed it, while the defendant shot the pistol three times, after which the brother shot the gun, inflicting the fatal wounds. This statement, as related by the wife of the deceased, is in conflict with the version of the eye-witnesses, and is not consistent with the physical fact that his body was directly in front of the store across the street, where the defendant and his witnesses said he went after leaving the store of the deceased. There was evidence that the deceased was of a violent character, and that he had purchased a box of gun shells a short while before the homicide.

Howard & Hightower, for plaintiff in error.

E. D. Graham, solicitor-general, contra.

RUSSELL, J. (After stating the foregoing facts.) 1. The defendant contended that the court erred in excluding from the jury his statement, made a short while after the fatality, under the following circumstances: After the three pistol-shots and a pause of a few seconds came the gunshot. Then the defendant's brother came into the store door with the gun in his hands, and said: "Let me have some shells. I am going out there and kill that God damn Charles McCall, who is the instigation of all this row." The storekeeper said: "You get out of this store with that gun. You can't get no shells in here." Whereupon the speaker walked back to the door, looked out on the ground, then slipped back in the store, and handed the gun to a bystander, remarking: "There's nothing in it." About that time the defendant jumped right up in the door, with the pistol in his hands, and said: "Men, what I done, I had to do it." On motion this statement was ruled out, and the question presented is whether it was admissible as a part of the *res gestæ*. The witness estimated that the time elapsing between the gunshot and the making of the statement was about half a minute.

Under such circumstances a witness's estimate of the exact number of seconds or minutes intervening is not very trustworthy. The important fact is that the statement was made, not during the fight, but after it was over, and after the defendant had left the scene of the homicide and appeared before the onlookers. How-

ever brief the time, the physical facts show that the statement was not wholly free from the suspicion of device or afterthought. As is said in *Hall v. State*, 48 Ga. 607: "The *res gestæ* of a transaction is what is done during the progress of it, or so nearly upon the actual occurrence as fairly to be treated as contemporaneous with it. No precise point of time can be fixed a priori where the *res gestæ* ends. Each case turns on its own circumstances. Indeed, the inquiry is rather into events than into the precise time which has elapsed."

It has been held that a witness could not testify that within a minute after the shooting, another person ran into the house, a distance of 25 or 30 steps from the scene of the shooting, and whispered that the accused had shot the deceased. The whispering indicated premeditation, rather than spontaneous exclamation; there being apparently nothing to call for the lowering of the voice, if the speaker was prompted by natural impulse only. *Futch v. State*, 90 Ga. 472 (16 S. E. 102). The line of demarcation between self-serving declarations, inadmissible under the hearsay rule, and involuntary spontaneous verbal acts, admissible as part of the *res gestæ*, is shadowy and hard to delineate with accuracy and generality. Circumstances alter cases, and each case must be governed by its own peculiar and individual facts. The defendant in this case, in saying that he had to kill, was not making an involuntary exclamation, but had left the scene of the killing, and reason had returned. We are of the opinion, therefore, that there was no error in excluding the testimony.

2. Complaint is made that the judge erred in failing to charge the law of involuntary manslaughter. Under the dying declaration offered by the State, the defendant was guilty of murder. According to the statement of the accused and the evidence in his behalf, the killing was justifiable. Under no theory was the killing unintentional or involuntary, and therefore the judge very properly omitted the law of involuntary manslaughter from his charge. Indeed, it would have been reversible error to have so charged under such circumstances. *Branch v. State*, 5 Ga. App. 651 (63 S. E. 714); *Clark v. State*, 117 Ga. 254 (6), (43 S. E. 853). In holding that the evidence authorized the charge on the law of involuntary manslaughter in the case of *Chapman v. State*, 120 Ga. 855, 857 (48 S. E. 350, 351), it was said: "If the brick was

hastily picked up and thrown, with no intention of killing the deceased, and the evidence failed to disclose that the brick was either a deadly weapon or was thrown in such a manner as ordinarily would have produced death, the homicide would be involuntary." Here the evidence discloses both that the weapon used was deadly and that it was used with the intention to kill. In the other case relied on by counsel for plaintiff in error, *Dorsey v. State*, 126 Ga. 633 (55 S. E. 479), the fatal blow was made with the end of a billiard-cue of a kind and character from which the jury could have inferred that there was no intention to kill.

3. In arguing the case to the jury the defendant's counsel undertook to illustrate with a single-barrel shotgun how the gunshot wound could have been inflicted as the defendant had stated. On objection from the solicitor-general that the gun had not been introduced in evidence, the judge refused to permit the use of the gun as aforesaid. It does not appear whether the gun which it was sought to use was the one with which the deceased was shot. Ordinarily, in illustrating to the jury an argument, counsel may use any means at hand; but it would be manifestly unfair to permit a party to get the benefit of having introduced evidence which had not been introduced. Under the circumstances, we see no reason for reversing the judgment because of this supposed error. *Nobles v. State*, 127 Ga. 213 (4), (56 S. E. 125).

4, 5. When the charge as a whole is considered in connection with the excerpt upon which the assignment of error is predicated and the facts of the case, the law relating to provocation by words, threats, and contemptuous gestures was correctly given. Irrespective of whether the written request was a correct statement of the law in the abstract, it was not adjusted to the evidence, and therefore there was no error in refusing to give it in the charge. None of the assignments of error present any reason for a reversal of the judgment.

Judgment affirmed.

3441. *TOLVER v. THE STATE.*

RUSSELL, J. 1. The circumstantial evidence was sufficient to corroborate the confession and authorize the verdict of guilty.

2. In a prosecution for simple larceny, where it appears that the goods alleged to have been stolen were sold, and thus had some value, it is

unnecessary to prove the price paid or the exact quantity. From legally admitted evidence it appears that the goods claimed to have been stolen had some value. The fact that other evidence as to value was illegally admitted will not, in the absence of other error, authorize a reversal of the judgment refusing a new trial.

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Accusation of larceny; from city court of Sandersville—Judge Jordan. April 15, 1911.

Goodwin & Wood, for plaintiff in error.

J. E. Hyman, solicitor, contra.

3443. COLLINS v. THE STATE.

- RUSSELL, J. 1. At the beginning of the trial the defendant, through his attorney, invoked the rule as to the sequestration of the witnesses. The prosecutor remained in the court-room while another witness for the State was being examined. The defendant complains that this was error requiring a new trial; that the prosecutor should have been examined first, or should have been required to leave the room during the examination of the other witness. The trial judge certifies that he did not know the prosecutor was in the room during the examination of the witness; that neither the defendant nor his attorney made any objection thereto at the time. *Held*, a new trial will not be granted. The failure of the defendant and his attorney to call the attention of the court to the presence of the prosecutor, or to request that he be examined first, constitutes a waiver of his right to a strict sequestration.
2. The defendant claimed he acted in self-defense. The law relating thereto was properly given in charge to the jury. If the defendant desired more detailed instructions as to his contentions, he should have made written requests therefor.
- Judgment affirmed.*

DECIDED NOVEMBER 7, 1911.

Accusation of assault and battery; from city court of Sandersville—Judge Jordan. April 27, 1911.

Evans & Evans, for plaintiff in error.

J. E. Hyman, solicitor, contra.

3446. FULLER v. THE STATE.

- RUSSELL, J. 1. While the argument of the solicitor as to the withdrawal from the case of some of the defendant's attorneys of record was highly improper, yet the refusal to declare a mistrial is not reversible error, in the light of the failure of the defendant to make objection until after

the judge had begun his charge, coupled with the curative effect of the instructions given to the jury to disregard the argument.

2. There was no error in admitting the evidence over the objection urged. The charge of the court was full and fair. There being direct as well as circumstantial evidence, if a charge on circumstantial evidence was desired, a written request to that effect should have been duly made. The evidence plainly indicated guilt. *Judgment affirmed.*

DECIDED NOVEMBER 7, 1911.

Accusation of misdemeanor; from city court of La Grange—
Judge Harwell. April 20, 1911.

M. U. Mooty, E. A. Jones, Arthur Greer, for plaintiff in error.

Henry Reeves, solicitor, contra.

3453. GORDON v. THE STATE.

1. There was no error in charging the jury that, when a witness has been impeached by contradictory statements previously made, he may be sustained by proof of general good character.
2. The evidence authorized the verdict, and no error of law appears.

DECIDED NOVEMBER 7, 1911.

Accusation of sale of liquor; from city court of Dublin—Judge
Hawkins. April 19, 1911.

Adams & Flynt, for plaintiff in error.

George B. Davis, solicitor, contra.

RUSSELL, J. 1. A witness for the State testified that the defendant had sold him a quart of liquor. The defendant sought to impeach this witness by proving certain contradictory statements previously made. The State sought to sustain him by proof of general good character, and introduced witnesses who swore that they had known the witness from his boyhood, and, so far as they knew, his reputation was good, and they would believe him on oath. One of the witnesses had lost track of him for two or three years previous to the trial. The judge charged the jury as follows: "I charge you that, when a witness has been impeached by contradictory statements previously made, he may be restored by proof of general good character." The criticism of the charge is that there is no testimony in the case to authorize it; the insistence being that the State wholly failed in its attempt to prove general good character. "Although witnesses may state they do

not know that they are acquainted with the general character of the prosecutor, yet, if they state they have been acquainted with him for a long time, or for a given number of years, and that they have never heard any one speak ill of him, these facts show substantially that they did know his general character sufficiently to qualify them to swear that they would believe him on oath in a court of justice." *Hodgkins v. State*, 89 Ga. 761 (15 S. E. 695). See, also, *Watkins v. State*, 82 Ga. 231 (8 S. E. 875, 14 Am. St. R. 155).

2. Although the only witness for the State to the main fact was impeached by contradictory statements previously made, the jury nevertheless had a right to believe his testimony, which made a clear case of guilt. *Judgment affirmed.*

3454. CHASTAIN *v.* THE STATE.

RUSSELL, J. The evidence amply authorized the verdict, the charge was free from prejudicial error, and no sufficient ground for reversal appears. *Judgment affirmed.*

DECIDED NOVEMBER 7, 1911.

Indictment for assault with intent to murder; from Grady superior court—Judge Frank Park. April 12, 1911.

Theodore Titus, M. L. Ledford, for plaintiff in error.

W. E. Wooten, solicitor-general, F. A. Hooper, contra.

3468. SMITH *v.* THE STATE.

The record discloses no reversible error.

DECIDED NOVEMBER 7, 1911.

Indictment for assault with intent to murder; from Dougherty superior court—Judge Frank Park. April 24, 1911.

The defendant was convicted of assault and battery. It appears, from the evidence, that he and his son were making a disturbance on the streets of Albany, by cursing one another; that easily within hearing were some females; that one or two citizens had caught hold of the defendant's son, and that a crowd had assembled. A policeman arrived, and the defendant was pointed out to him as

being the one who was "raising Cain;" and before the policeman had said a word, the defendant hit him with a flint rock weighing five or six pounds. The rock was thrown a distance of about four feet, and struck the policeman in the forehead, making a gash about $2\frac{1}{2}$ inches long all the way to the skull. The policeman did not have a warrant for the defendant.

R. J. Bacon, Ben T. Burson, for plaintiff in error.

W. E. Wooten, solicitor-general, F. A. Hooper, contra.

RUSSELL, J. (After stating the foregoing facts.)

1. Complaint is made of the admission of the following evidence: One of the bystanders, as a witness for the State, was asked: "When Mr. Perry [the policeman] got there, what was going on? What was the defendant doing, and what trouble, if any, in which he was connected, was in progress?" The witness answered: "Him and his son was cursing one another." The defendant objected to this evidence, because the policeman had previously testified that at the time of his arrival the defendant was standing by his wagon, and was doing nothing illegal, so far as he saw; and therefore it is contended, there being no disturbance so far as the policeman saw, it was immaterial what the defendant was doing. We are of the opinion that if the defendant was creating a breach of the peace in the policeman's physical presence, he would have a right to make the arrest without a warrant, whether he heard the cursing or not. The crime was being committed in his presence, whether he knew the full extent of it or not. *Ramsey v. State*, 92 Ga. 53 (17 S. E. 613); *Porter v. State*, 124 Ga. 297 (52 S. E. 283, 2 L. R. A. (N. S.) 730); *Jenkins v. State*, 3 Ga. App. 146 (59 S. E. 435).

2. Exception is taken to the admission of evidence as to what was said by the defendant and a bystander just as the rock was being hurled. We think this evidence was admissible as a part of the *res gestæ*.

3. It appears that after the defendant threw the rock he ran, pursued by the policeman, who fired several shots and finally succeeded in arresting the defendant. It is contended that the defendant was justified in resisting the arrest, which it is claimed was illegal, and that the evidence shows he used no more force than was necessary; subsequent events showing that the force he used was not even sufficient to prevent the arrest. What happened to

the defendant after he had committed a second crime can not be set up as justification for resisting an illegal arrest for the first one. The jury was authorized to infer both that the arrest was legal and that, even if illegal, the defendant used more force than was his legal right under the circumstances.

Judgment affirmed.

3473. GEORGIA, FLORIDA & ALABAMA RAILWAY CO. v. FLORIDA
& GEORGIA TOBACCO CO.

- POWELL, J. 1. In a suit against a carrier for failure to deliver a portion of a shipment of goods alleged to have been intrusted to it for transportation, error, if any, in admitting in evidence a bill of lading covering the shipment, over objection for lack of proof of execution, becomes immaterial, where the carrier admits that it received the goods sued for, and sets up delivery.
2. There is no general assignment of error that the verdict is contrary to the evidence or without evidence to support it, nor any special assignment of error that the value of the goods was not proved. It follows that though the verdict is without evidence to support it, because of lack of proof as to this element of the case, no new trial can be granted on that account.
3. None of the assignments of error are well taken, so far as they are supported by the record.
4. The trial court was not without jurisdiction of the case.

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Action for damages; from Decatur superior court—Judge Frank Park. May 12, 1911.

Hawes & Pottle, Rich & Nelson, for plaintiff in error.

John R. Wilson, contra.

3486. RENFROE v. THE STATE.

- RUSSELL, J. 1. A plea of former jeopardy can not be predicated on the fact that the defendant has previously been put on trial under a void accusation. Such an accusation being an absolute nullity, the defendant could not waive the defect therein and consent that the trial proceed.
2. The instruction requested was substantially embodied in the general charge; and the omission to define an unlawful arrest, in the absence of any request on that subject, is not reversible error.
3. The evidence amply authorized the verdict of guilty.

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Accusation of pointing weapon at another; from city court of Sandersville—Judge Jordan. April 28, 1911.

1. The accusation set out in the plea of former jeopardy omitted to state the kind of weapon pointed by the accused, or the name of the person at whom it was pointed. He was charged "with the offense of pointing a weapon at another; for that," at a designated time and place, he did, "unlawfully and with force of arms, intentionally point one certain _____ at one _____, not in sham battle," etc. This accusation was quashed, over the objection of the defendant, after he had waived arraignment, pleaded not guilty, and demanded a jury, and while the case was on trial before the jury. The subsequent accusation, under which he was tried, was identical with the former accusation, except that the above-mentioned omissions were supplied by describing the weapon as a pistol and naming W. L. Smith as the person at whom it was pointed. The first assignment of error is that the court, on demurrer, struck the plea of former jeopardy.

2. The grounds of the motion for a new trial, in addition to the general grounds that the verdict was not supported by evidence, etc., were that the court, in charging the jury, erred in not defining an unlawful arrest; and that the court refused a request to charge that "if the weapon was pointed by the defendant as he was raising his hand to shield himself from a blow or to prevent himself from being struck, and not with the intention of pointing it as charged, he would not be guilty." The court charged the jury that before they would be authorized to convict, it would be necessary for them to find that the defendant intentionally aimed and pointed the weapon at the person named in the accusation.

3. From the evidence it appears that the defendant, while intoxicated, was in a store, talking loudly and using profanity, when he was approached by W. L. Smith, a policeman, wearing a policeman's uniform and badge, and carrying a club, and that a struggle between them ensued, during which the defendant took a pistol out of his pocket and pointed it at Smith's stomach; that Smith struck him twice on the head with the club before the pistol was pointed, but he was getting it out of his hip pocket before Smith struck the first blow, and had it out before the second blow was struck.

W. E. Armistead, for plaintiff in error, cited: Penal Code (1910),

§§ 954, 980, 5, 349; 86 Ga. 268; 90 Ga. 444; 112 Ga. 750; 5 Ga. App. 472 (2); 77 Ga. 692.

J. E. Hyman, solicitor, contra, cited: 3 Ga. 534; 85 Ga. 348; 106 Ga. 355.

3490. CHATFIELD v. THE STATE.

In overruling the motion for a continuance, the court did not commit such an abuse of discretion as, in the light of all the facts of the case, requires a reversal.

DECIDED NOVEMBER 7, 1911.

Indictment for sale of liquor; from Crawford superior court—
Judge Felton. May 11, 1911.

Robert W. Barnes, for plaintiff in error.

Walter J. Grace, solicitor-general, contra.

POWELL, J. The accused was convicted of selling liquor. The first indictment against him was quashed for a defect, and a new one immediately returned. As to each of these indictments he asked for a continuance, that he might obtain the testimony of certain witnesses as to his good character. It is inferable from the record that both indictments were returned at the same term of the court at which the accused was tried, and that subpoenas were not requested for the witnesses until after the court had convened. It does not appear when the accused was first arrested for the offense. It does not appear that he had not been previously committed by a magistrate. As to witnesses residing in the county, the accused must, in order to make his showing complete, either show that he has had them subpoenaed under the provisions of sections 943, 944, of the Penal Code of 1910, or else that there has been no commitment trial. As to the witnesses Cray and Morton, it does not appear that they resided out of the county; hence, as to them the showing was incomplete. As to the other absent witnesses, there was no showing that they had ever been served with subpoenas. It does appear that subpoenas were issued for them and left with the clerk. As it is not the duty of the clerk to serve subpoenas, the showing as to them is legally incomplete, viewed from the standpoint of a formal showing for continuance on legal grounds. The showing as a whole made a case for the exercise of a sound discretion by the judge.

A case ought to be continued, in order that a party may get material witnesses, even if they have not been subpoenaed, if the party has not had a reasonable time in which to procure their testimony. However, it appears in this case that the only testimony the accused desired from these witnesses was as to his general good character. He had witnesses present who did testify as to his good character, though perhaps the testimony of the absent witnesses might have been more desirable in this respect, since they had known the accused for a longer time than had the witnesses who testified. But the State made no attack on his general character. So far as the record discloses, the State conceded that he bore a good reputation. The insistence of the State was that, despite his good general reputation, he had made a number of distinct sales of liquor to different persons; and this the State proved by a number of witnesses, whose credibility is in no wise attacked. This evidence is so strong that it is hardly reasonable to believe that the accused would have been acquitted if every man in the State had testified that he bore a good reputation. In the light of this, the alleged error as to the judge's abusing his discretion in refusing a continuance is not deemed sufficient to justify a reversal.

Judgment affirmed.

3492. PHELPS v. THE STATE.

Abandonment, as a criminal offense, contains two essential ingredients: separation from the child, and failure to supply its needs. The offense is not complete until there is a conjunction of these two ingredients, as mere absence from one's child is not of itself a criminal offense. The crime of abandonment begins and continues as long as there is a failure on the part of the father to perform his parental duty, and consequent dependence of the child. Where it appears that an absent father has for the two years immediately preceding the finding of the accusation against him, failed and refused to provide for his dependent child, the time when the original separation took place is entirely immaterial. The continuing dependency of the child vitalizes the offense, and the fact that the absence, and even the dependency, began more than two years prior to the accusation affords no ground for the interposition of the statute of limitations.

DECIDED NOVEMBER 7, 1911.

Indictment for abandonment of child; from Butts superior court—Judge R. T. Daniel. May 16, 1911.

H. M. Fletcher, for plaintiff in error.

J. W. Wise, solicitor-general, contra.

RUSSELL, J. The only question involved in this case is whether the offense is barred by the statute of limitations. The defendant in the court below was charged with the offense of abandonment, and claims that he is entitled to an acquittal for the reason that the evidence shows that it has been four or five years since he left his wife and child, or since he furnished the child anything. The wife of the defendant, however, testified that she had repeatedly, within the last two years, asked the defendant to do something for his child, and that within the two years he each time refused her request. A majority of the court think the determination of the point at issue depends upon the nature of the ingredients necessary to constitute the offense of abandonment, and we are of the opinion that abandonment is a continuing offense, at least until the defendant has once been convicted thereof. We hold that the facts of this case distinguish it from the case of *Gay v. State*, 105 Ga. 599 (31 S. E. 569, 70 Am. St. R. 68), and that the ruling in that case is not binding as a precedent. The precise point, and the only point, presented for the decision of the Supreme Court in that case, was whether one who had once been convicted of abandoning his child could be again convicted of abandoning the same child. Whatever else is said in the opinion in a general way, in reasoning as to the nature of the offense of abandonment, can, we respectfully insist, be treated as mere obiter in arguendo. It is not authority. The usual cogent reasoning of the distinguished Justice who wrote the opinion (being beside the question to be decided) does not appeal persuasively to the majority of this court. To say the least of it, it would seem to be bad policy to apply the statute only to the father who might return to his child and attempt to repair, in some degree, the wrong he had done it, and, on the other hand, to reward the heartless father who callously abandoned his offspring to its fate forever.

Moreover, if precedents are to be consulted, we think it is clearly to be inferred from the rulings in *Bennetfield v. State*, 80 Ga. 107 (4 S. E. 869), *Bull v. State*, 80 Ga. 704 (6 S. E. 178), and *Brown v. State*, 122 Ga. 568 (50 S. E. 378), as well as the rulings of this court in *Moore v. State*, 1 Ga. App. 502 (57 S. E. 1016), *Cleveland v. State*, 7 Ga. App. 622 (67 S. E. 696), and *Ware v.*

State, 7 Ga. App. 797 (68 S. E. 443), that abandonment is not only an offense which requires the conjunction of two essential elements, but that it is necessarily a continuing offense, so far at least as the element of dependency is concerned. From a review of the decisions in each of the above-stated cases, we are constrained to believe that it would never do to hold that a father who had left his child in a dependent condition should be allowed to take advantage of his own wrong by pleading the statute of limitations, and setting up that the neglect of his offspring, though flagrant, had continued for such a length of time that the offense was barred by the statute of limitations. A father who wilfully and voluntarily abandons his children is not guilty of any offense merely because he leaves them. If he has them properly maintained and cared for, even if he be absent, he violates no statute law. Certainly, then, the statute of limitations does not begin to run from the time when the father separates himself from his children. *Brown v. State*, 122 Ga. 570 (50 S. E. 379).

"Abandonment does not mean merely going away from destitute and dependent children, though absence is a necessary element to constitute the crime." Intention is so essentially a part of every crime, and particularly that of abandonment, that the wilfulness and voluntariness which is involved in this section of the code is accentuated where there is, as in the case now before us, evidence of a demand upon the father for the support of his child, and a refusal to comply, and this within two years before the prosecution. As held in *Moore v. State*, 1 Ga. App. 502 (57 S. E. 1016), quoting from the language of Chief Justice Bleckley in *Bull v. State*, 80 Ga. 704 (6 S. E. 178): "A father who within this State wilfully and voluntarily abandons his child . . . and persists in the abandonment afterwards, leaving it in a dependent and destitute condition, . . . is guilty." He further says: "That a father begins to abandon his child some months before it is born will not excuse him for persisting in the abandonment and failing to furnish it with the necessities of life." From this language we think it is clearly to be inferred that the Supreme Court recognizes the act of abandonment as being a continuous act. There is in the *Gay* case no reference to the *Bull* case, and no overruling of the doctrine which clearly runs through it. In the *Brown* case, *supra*, it appears that the trial court not only refused to charge

that the defendant would not be guilty unless he left his children in a dependent and destitute condition at the time of the abandonment, but that, instead thereof, the court instructed the jury that "if the defendant wilfully and voluntarily abandoned his children, and after said abandonment the children became in a dependent and destitute condition, and the defendant *continued* to wilfully and voluntarily abandon said children, leaving them dependent and destitute, and refused to support them, he would be guilty;" and this charge was approved by the Supreme Court. In reference to the exceptions to it, Justice Lamar said: "The charge of the court was correct."

To our minds it is perfectly clear that abandonment, as a criminal offense, includes two essentials: the voluntary separation of the father from his child (whether he leaves the child or sends it away), and failure to provide for it the support which the law obligates him to give. A father who leaves his children in a dependent condition, though it be for several years, but who, for the period of two years prior to an accusation being preferred against him, cares for their needs, may plead the bar of the statute of limitations; but an absent father, who for two whole years prior to the accusation of abandonment leaves his offspring dependent and in want, so that this condition exists at the very time that the accusation is being preferred, can not, in our judgment, successfully interpose to the prosecution the bar of the statute, or otherwise defend himself.

Judgment affirmed.

POWELL, J., concurring specially. There is a strong appearance of validity in the argument that the case of *Gay v. State*, 105 Ga. 599 (31 S. E. 569, 70 Am. St. Rep. 68), is controlling here; but I am not so sure that that case and this one are not distinguishable as to be willing to dissent. The opinion of Judge Russell certainly leans toward giving the law a very salutary interpretation, and I think that, wherever a doubt exists as to the meaning of a law, the judge should strive to give it that construction which makes it most effective. The offense of abandonment created by our statute consists of two elements: the desertion, an act of the father; and dependence, a condition of the child. The two must concur before there is any crime. The *Gay* case holds that as to the first element (desertion) the act is not a continuous one, and that when a person is once convicted he can not be tried again until this element oc-

occurs again, and that it can not occur again until the father goes back to his family and leaves anew. The other element, the condition on which the desertion must operate, the state of the child's dependency, is a thing continuous in its nature. If this alone constituted the offense, it would not be barred, so long as it continued to exist. *Coker v. State*, 115 Ga. 210 (41 S. E. 684). Since the offense now before us consists of these two diverse elements, the position taken in the opinion in chief—that while a conviction will bar future prosecutions till the element of desertion occurs anew, the statute of limitations does not bar the offense, because one of its elements, the condition of the child, remains continuous—strikes me with such force that I am not willing to dissent from it.

3510. ATLANTIC COAST LINE RAILROAD CO. v. THOMAS.

POWELL, J. This case is on all fours with the case of *Georgia Railroad Co. v. Wall*, 80 Ga. 202 (7 S. E. 639), so far as controlling principles are concerned. The chief physical difference between the two cases is that in the case cited the engineer's vision was obscured by fog, while in the case at bar it was obscured by falling rain and the natural accumulation of mist on the front window of the cab. The law expects railroad companies to run their passenger-trains on schedule, so far as they may be able to do so; and they are not ordinarily required, when it is foggy or raining, to reduce their trains to such a rate of speed as that the engineer may be in a position to discover live stock on the track in time to prevent injuring them.

Judgment reversed.

DECIDED NOVEMBER 7, 1911.

Certiorari; from Brooks superior court—Judge Thomas. May term, 1911.

Bennet & Long, for plaintiff in error.

H. B. Austin, M. Baum, contra.

3515. TENNESSEE OIL & GAS CO. v. AMERICAN ART
WORKS.

1. Under the act of December 13, 1902 (Acts 1902, p. 117), any default entered by the judge of the city court of Atlanta may be opened upon the terms and conditions stated in that act, provided the motion to open the default is made before final judgment is rendered.

2. If both default and final judgment have been entered, the defendant can not have the default opened without first vacating the judgment. While the court has power over any judgment during the term at which it is rendered, still a judgment should not be set aside for insufficient reason, even though the application to set it aside is for the purpose of allowing the default on which the judgment is based to be opened.

DECIDED NOVEMBER 7, 1911.

Motion to open default; from city court of Atlanta—Judge Reid. May 19, 1911.

E. A. Stephens, Walter McElreath, for plaintiff in error.

Walter C. Hendrix, Mayson & Johnson, contra.

POWELL, J. The suit was brought in the city court of Atlanta. Under the practice in that court, a case is in default unless the defense is filed on or before the first day of the term to which the case is returnable, and verdict and judgment in undefended cases may be rendered at the first term of the court. Formerly there was no provision for opening a default once suffered in this court, but under the act of December 13, 1902 (Acts 1902, p. 117), any default entered by the judge of the city court of Atlanta may be opened "during the term at which such default is entered, upon payment of all costs, or in the discretion of said judge;" and he may open it after the expiration of the term at which the default is entered, "upon the same terms and conditions as may judges of the superior courts of this State" open defaults. In this case default was suffered, and during the same term of the court verdict and final judgment were entered against the defendant; and later during the same term the defendant appeared and paid all the costs, and moved to open the default, and tendered an apparently meritorious defense, and gave as his excuse why the defense had not been filed sooner that an attorney had been employed to represent the defendant, and that he, through inadvertence, had failed to file the defense in time. If final judgment had not been entered in the case, the motion to open the default would have been sufficient; for, under the act of 1902, the defendant is entitled to open the default, as such, at any time during the first term of the court, by paying the costs.

But this relates to the opening of the default as such. Here the case had passed beyond the stage of mere default. It was necessary for the defendant to get rid of the judgment which had been finally rendered in the case. During the term at which judgment

was rendered, it still rested largely in what is called "the breast of the court;" that is to say, the court still had general control over it for the purpose of setting it aside or modifying it. But a judgment once regularly rendered should not be set aside captiously, or unless the party moving to set it aside shows some good reason why it was improvidently rendered. In this case no such reason was shown. In principle, this case and the case of *O'Connell v. Friedman*, 118 Ga. 831 (45 S. E. 668), are identical, though they differ somewhat as to the facts presented. In *Mathews v. Bishop*, 106 Ga. 564 (32 S. E. 631), the difference between opening a default and opening a final judgment rendered at the first term in the city court of Atlanta was pointed out, and it was there held that the judgment should not be vacated, unless the defendant showed a valid excuse for failing to appear and plead at the proper time. Since the judgment of default could not be set aside without the final judgment first being vacated, and since the motion set up no sufficient reason for vacating the judgment, the court properly denied the motion.

Judgment affirmed.

3522. *HARDU v. THE STATE.*

1. The defendant's own statement amounted, in effect, to an admission that he had caused to be furnished to a minor malt beer, in violation of section 444 of the Penal Code (1910).
2. An agent who negotiates for his principal a sale of beer to a minor is equally guilty with the principal.

DECIDED NOVEMBER 7, 1911.

Accusation of sale of liquor; from city court of Swainsboro—
Judge H. R. Daniel. March 4, 1911.

Saffold & Larsen, C. E. Dunbar, for plaintiff in error.

A. S. Bradley, solicitor, contra.

RUSSELL, J. The defendant was convicted of furnishing malt liquors to a minor. According to the testimony and the statement of the defendant himself, the defendant, as agent for a brewery, sold to Roy Rountree, a young man about 17 years of age, five dozen bottles of beer, or "near beer." There was some conflict in the evidence as to the intoxicating quality of the fluid, though the preponderance of the testimony was to the effect that it was a non-intoxicating fluid. The minor was engaged in business as a part-

ner in a mercantile firm, under the name and style of Medlock & Rountree. He purchased goods for the firm, and he solicited the shipment of the malt liquor in question in the course of similar business negotiations as to other articles. However, there was no dispute that Rountree was a minor, and no contention that the defendant had any reason to believe that Rountree had attained his majority.

1. Section 444 of the Penal Code (1910) makes the furnishing to a minor of malt liquors of any kind (whether intoxicating or not) a criminal offense. *Stoner v. State*, 5 Ga. App. 720 (63 S. E. 602); *Campbell v. Thomasville*, 6 Ga. App. 212-236 (64 S. E. 815). The infraction of the law is apparently more technical than real, in the case at bar, and in our judgment does not call for the imposition of a heavy penalty; but under the ruling in the *Stoner* case, supra, it can not be said that the defendant was not legally convicted of furnishing a minor with a malt liquor.

2. The issue as to the defendant's guilt is not affected by the fact that he was merely an agent in the sale negotiated. By reason of his agency he sustained an accessorial relation; and, there being no accessories (but all participants in the criminal act being principals) in misdemeanors, the defendant became a principal.

Judgment affirmed.

3530. RAYFIELD v. THE STATE.

RUSSELL, J. Where the undisputed evidence shows that the defendant was in possession of the stolen goods on the very night of the burglary, it is not prejudicial error requiring a new trial that the judge, in charging the jury as to the presumption raised from such possession, left out the word "recent." The error in the charge was immaterial, and harmless as to the defendant.

2. The testimony of the accomplice was fully corroborated, and the verdict of guilty authorized. *Judgment affirmed.*

DECIDED NOVEMBER 7, 1911.

Indictment for burglary; from Bibb superior court—Judge Felton. February 3, 1911.

W. D. Nottingham, W. A. McClellan, for plaintiff in error.

Walter J. Grace, solicitor-general, contra.

3537. HOLLOWAY v. THE STATE.

Even though a witness be successfully impeached by proof of general bad character, yet where his testimony as to the transaction in dispute is corroborated in material particulars, the jury have a right to believe that as to that particular transaction he is telling the truth.

DECIDED NOVEMBER 7, 1911.

Indictment for sale of liquor; from Pike superior court—Judge Daniel. May 22, 1911.

Meadows testified, that Stocks, chief of police, gave him 25 cents and an empty bottle to get whisky from the defendant, and he went into her house and bought whisky from her, paying her 10 cents for it, and returned the bottle, with this whisky in it, and 15 cents in change, to Stocks, who was waiting in front of the house; also that his own character was bad and sometimes he would not believe himself on oath. Stocks testified, that he searched Meadows, found he had no whisky or money, gave him 25 cents and an empty bottle, and waited outside while Meadows went in the defendant's house, and in a few minutes Meadows returned the bottle to him, with whisky in it, and 15 cents; that the defendant pleaded guilty in the mayor's court; and that Meadows's character was bad and he would not believe him on oath. These were the only witnesses introduced for the State. The defendant made the following statement to the jury: "Ben Meadows came to my house a few days before, this time, and had a basket and some whisky in it. He came in, got something out of the basket, and went out. I never sold him any whisky in my life. I was ironing when he came in, and he asked me for some whisky, and I told him I did not have any, and he went out."

Henry O. Farr, for plaintiff in error.

J. W. Wise, solicitor-general, contra.

RUSSELL, J. The motion for a new trial raises only the question whether under the evidence the conviction was legal. We are inclined to agree with the main witness himself, and also with the policeman, that the former's character is bad, and that, as a general proposition, his testimony would be unworthy of credit; but the circumstances of corroboration are such as might authorize the inference that the witness was telling the truth as to the transaction testified to in the instant case. *Strozier v. Carroll*,

31 Ga. 557; *Powell v. State*, 101 Ga. 20 (5), (29 S. E. 309, 65 Am. St. Rep. 277); *Haynes v. State*, 17 Ga. 465. The only question involved was one to be determined by the jury, and by the jury alone. There is no limitation on the power of a jury to credit a witness, unless the facts testified to by him be, according to the common knowledge of mankind, inherently impossible. *Pyles v. State*, 3 Ga. App. 29 (59 S. E. 193); *Jolly v. State*, 5 Ga. App. 454 (63 S. E. 520). *Judgment affirmed.*

3568. BROWN v. THE STATE.

1. On the trial of an indictment for murder, where the offense of voluntary manslaughter is reasonably deducible from the evidence or the defendant's statement to the jury, considered separately or together, a charge on the law of voluntary manslaughter, and a verdict for that offense, were authorized. *Cain v. State*, 7 Ga. App. 24 (65 S. E. 1069); *Pyle v. State*, 4 Ga. App. 811 (62 S. E. 540); *Bell v. State*, 130 Ga. 865 (61 S. E. 996); *Strickland v. State*, 133 Ga. 76 (65 S. E. 148).
2. The credibility of a witness is exclusively for determination by the jury, and, although a witness may have been successfully impeached, it is left to the discretion of the jury to decide whether his testimony has been corroborated; and, while it would be their duty to disregard entirely the testimony of an impeached witness, unless corroborated, yet they have the right to believe the evidence of a witness, notwithstanding the impeachment, and in the absence of any corroboration. Section 5884 of the Civil Code (1910) is not intended as an abridgment of the absolute right of the jury to determine as to the credibility of witnesses.
3. The right of a parent to protect and defend his minor daughter from seduction or debauchery exists under the law of the State without other qualification than that stated in the statute, to wit, that the act of the parent must be one of *protection* or *defense* against *intended* or *progressing* wrong, and not in punishment or revenge for a past injury. A charge to this effect was applicable to the facts of this case.
4. The excerpts from the charge embraced in the sixth and seventh grounds of the motion for a new trial correctly state the law as repeatedly decided by the Supreme Court, and were pertinent and applicable to the evidence.
5. The right of the accused to make to the jury a statement in his defense is strictly a personal privilege, granted by the statute, and, whether written or oral, the statement must be read or spoken by the accused, and not by his attorney.

DECIDED NOVEMBER 7, 1911.

Conviction of voluntary manslaughter; from Pulaski superior court—Judge Martin. June 16, 1911.

Herbert L. Grice, H. E. Coates, W. L. & Warren Grice, for plaintiff in error.

E. D. Graham, solicitor-general, contra.

HILL, C. J. Brown was indicted for murder, and was convicted of voluntary manslaughter. His motion for a new trial having been overruled, the case is here for review. In addition to the usual general grounds, the motion for a new trial contains the following assignments of error:

(1) Under the evidence the killing was either murder or justifiable homicide, and the verdict of manslaughter is contrary to law.

(2) The evidence of only one witness proved the guilt of the accused, and, this witness having been successfully impeached in several material particulars, and the evidence of this one witness not having been corroborated in any material particular, as required by section 5884 of the Civil Code (1910), there was no credible evidence to support the verdict.

(3) The evidence did not authorize a charge on the law of voluntary manslaughter.

(4) The court charged, without qualification or explanation, that parents and children may mutually protect each other, and there was no evidence to support such charge.

(5) The court charged that "a parent may protect his minor daughter from debauchery to the same extent that a husband would be allowed to defend and protect the chastity and virtue of his wife." This was error, for the reason that the evidence did not show that the deceased was engaged in protecting either his wife or his daughter from debauchery.

(6) The court charged: "So, if the deceased, Nelson Spivey, assaulted the defendant on the ground that the defendant was committing a sexual act with the daughter of Nelson Spivey, if this was being done, it would be justifiable; but [for] what was done in the past, and to avenge such conduct after its occurrence, the deceased, Nelson Spivey, would not have a right under the law to make the assault and attack upon the defendant, and the defendant would not be deprived of his right of self-defense to resist and repel the assault." There was no evidence of the hypothetical recital in this charge, and it was calculated to injure the defense.

(7) On this subject the court further charged: "That is to say, in the case now on trial, before Nelson Spivey would have been authorized to make an attack upon the defendant, it must appear from the evidence that the defendant and the daughter of Nelson Spivey were then in the act of having sexual intercourse, or that the situation was such at that particular time that, as a reasonable man, Nelson Spivey could not tell whether it was just over, or just about to begin. Under these conditions, a party would have a right to make an assault, even to taking life, and the party against whom the assault was made would not have the right to resist him, even by taking his life." Error because this statement, without qualification, is not the law of Georgia; and also because there was no evidence to justify the charge, and it was calculated to injure the defendant before the jury.

(8) The court charged the jury on the subject of the impeachment of witnesses by proof of contradictory statements, not made under oath, and by proof of bad character, and the weight to be given the testimony of such witnesses, when there had been no attempt by either side to impeach any witness by either of these methods. This was calculated to confuse the jury in weighing the evidence of Della Spivey, a witness for the State, who, as movant insists, had been impeached by proof of perjury, and there was no evidence to justify this charge.

(9) At the conclusion of the evidence, the accused stated that his statement to the jury, made on the previous trial, had been written out by the official stenographer, and he desired to make the same statement on the present trial, and his attorney would read it for him. The solicitor-general admitted that the statement proposed to be read was the one which the accused had made at the previous trial, but objected to counsel's reading it. The court sustained the objection, and said to the accused that he could go on the stand and make to the jury just such statement as he saw fit, and the accused did so. It is insisted that this ruling was error, because it deprived the accused of the right, given him by law, "to make to the court and jury such statement in the case as he may deem proper in his defense."

The evidence, substantially stated, is as follows: On the night of the homicide, Nelson Spivey was at home with his wife and several children. About 7 o'clock, a little son came into the room,

and told his father that "Della is over yonder in that house with Bill." Della was a daughter, about 17 years old, and Bill was the accused. The house referred to was a vacant house in a field nearly a quarter of a mile from the home of the deceased. Immediately on getting this information, the decedent took his whip and went out. In 10 or 15 minutes, a shot was heard coming from the direction of the vacant house. Members of the family went towards the house in a few minutes, and found the body lying in a path going by the vacant house, and about 30 feet away from the door. He had been killed by a bullet through the breast.

The girl Della testified, that she and Bill (the accused) were sitting on the floor in the vacant house alone, engaged in conversation, when her father suddenly appeared in the door; that she jumped up and ran out by her father, and had gone some little distance, when she heard the report of a gun in the direction of the house from which she had run; that she saw a pistol in the pocket of the accused while they were sitting on the floor talking; that neither her father nor the accused spoke while she was present, and she noticed nothing in her father's hand when he appeared. She did not know what occurred between the two after she ran away and just previous to the fatal shot. She testified that the accused and herself had not been guilty of any immoral conduct, and were not in the house for that purpose. On cross-examination, she testified that, while she did not remember the details of her testimony on the previous trial, the account she then gave of the occurrence just before the homicide was not the truth; that she was then "scared," as she had never before been in a court-house, but that now "I am trying to tell this thing like it was." It may be here stated that the only material conflict in her evidence on this trial and the previous one was as to the place where the accused and herself were talking when they were interrupted by the sudden appearance of her father. She then testified that they were standing in the path near the vacant house, and that a third person was present. The remainder of her evidence on both trials is substantially the same. Whatever was said or done by either the accused or the decedent at the time of the homicide is not disclosed by the evidence.

The accused, in his statement to the jury, said that he and a companion met Della in the pathway going by the vacant house;

that they stopped and spoke to her; that he was about to pass on, when she told him that she had something to tell him; and that while they were talking the decedent came up to them and asked what they were doing there, and he replied, "Nothing;" that Della ran away, and her father struck him on the head with a whip; that he "broke and ran," and the decedent pursued him, striking him repeatedly with the whip. "I fell, and he wore his whip out on me, so he could not use it; broke it up. He run his hand in his pocket and got out his knife, and opened it with his teeth, and, as he got it open, I shot him. That is just the way it was."

Two witnesses in behalf of the accused testified, that the body of the decedent was found about 30 or 40 yards from the old vacant house in the path leading by the house through the field; that about 30 yards from the house and 40 yards from where the body was found the appearance of the ground indicated that a struggle had taken place; that a broken whip was on the ground by the body, and an open knife was in the left hand of the decedent. No powder stains were found on the clothing of the decedent.

Several of the grounds of the motion for a new trial relate to the same subject, and we will group them and decide the questions raised, in the light of the evidence.

1. Could the jury reasonably deduce from the evidence and the statement of the accused the crime of voluntary manslaughter? The evidence alone does not clearly show the grade of the offense; indeed, it does not conclusively prove any offense. The killing by the accused is reasonably inferable from all the circumstances, but what immediately preceded the killing, or what caused it, is more or less a matter of speculation, so far as the evidence discloses. The only witness for the State saw the pistol in the pocket of the accused. She saw her father enter the door, but did not see any weapon in his possession. She immediately fled, and, when some distance from the scene, heard the report of the pistol. The struggle between the two men took place outside the house. The condition of the ground, and the broken whip, the open knife, the bullet in the breast of the deceased, proved a struggle. The particulars of this struggle must be left to conjecture, except as stated to the jury by the accused. This statement had such force only as the jury might think it right to give it. Penal Code (1910), § 1036. They had the exclusive right to reject it altogether, or accept it altogether, to believe it in part, or disbelieve it in part.

In the exercise of this unlimited discretion, they chose to accept as the truth that part of the statement which authorized the verdict of voluntary manslaughter. They accepted the statement of the accused that the decedent was striking him with the whip. They rejected the statement that the accused did not shoot until the decedent drew his knife and opened it with his teeth, and was about to cut him. They probably rejected entirely the statement relating to the knife. There were circumstances that indicated that the knife defense was fabricated. The knife was not found by those who first reached the dead man. Its appearance was coincident with the appearance of the friends of the accused. It was found opened in the open left hand of the decedent, and no powder-burn or stain was found upon the clothing of the decedent. The jury doubtless thought that the whipping was not an attempt to commit a felony, and therefore the killing was not justifiable, but was an assault sufficient to arouse the excitement of passion and to reduce the crime to manslaughter. If they had concluded that the whipping by the outraged parent, of the man who was apparently intending to debauch his young daughter, was fully warranted, and that the accused had no rights under the law, this court would have approved. If they had thought that the attempted seducer of the daughter should have submitted to the just chastisement inflicted by the angry father, and, without violent resistance, "writhed in grace and groaned in melody," keeping time to the crack of the whip, and that the killing of the father by the wrong-doer was murder, the finding would have been in accord with law and justice. The verdict of voluntary manslaughter was not only fully warranted by the circumstances, and that portion of the statement of the accused which the jury believed, but was largely tempered by mercy.

2. (Second and eighth grounds.) The evidence of the girl, Della Spivey, was immaterial and irrelevant as relating to the verdict of manslaughter. As above suggested, what she testified on this trial, or on the first trial, did not present any theory upon which the grade of the homicide could have been satisfactorily determined. But the credibility of the testimony was entirely for the jury. It was for them to decide whether she was telling the truth on this or on the former trial. Suppose the jury believed her statement that she was "scared" when she testified on the pre-

vious trial, but was now telling the truth, would they not have had the right to do so? While section 5884 of the Civil Code (1910) declares that, "if a witness swear wilfully and knowingly falsely, his testimony ought to be disregarded entirely, unless corroborated by circumstances, or other unimpeached evidence," yet the jury may credit even an impeached witness without any corroboration. The whole question of the credibility of witnesses is wisely left to the jury under any and all circumstances, and, though Ananias and Sapphira spoke again, the law would not strike them dead, but would leave their testimony to be weighed and accepted or rejected by the jury. In this case there were circumstances of corroboration.

3. It is said in the fourth and fifth grounds of the motion for a new trial that the court erred in charging, without qualification or explanation, that "parents and children may mutually protect each other, and justify the defense of the person or reputation of each other;" and also that there was no evidence to justify the charge. This excerpt is in the exact language of the statute. Penal Code (1910), § 74. We are not aware of any qualification of this mutual right, except that stated in the statute, that the act must be in "protection" or in "defense;" and certainly the statement of this right with the statutory qualification needs no other explanation. We think, also, that the facts fully justified the instruction. If the time ever comes when a father would be authorized to protect and defend his child of tender years, both in her person and her reputation, from the machinations of the wicked, it would be when she was absent from home at night in a vacant house, alone with a man armed to prevent interference, and with evil and criminal intent. Under such circumstances, it would be the duty of the parent to protect his child against her own evil inclinations, and to defend her from the wicked designs of the man.

4. The sixth and seventh grounds of the motion for new trial object to excerpts from the charge where the judge applies concretely to the facts of this case the general principle that a father would have the right to protect and defend his daughter from intended debauchery. These excerpts state the law as construed and declared by the Supreme Court in many decisions, notably in *Hill v. State*, 64 Ga. 453; *Gossett v. State*, 123 Ga. 431 (51 S. E. 394); *Drysdale v. State*, 83 Ga. 744 (10 S. E. 358, 6 L. R. A. 424,

20 Am. St. R. 340) ; *Wilkerson v. State*, 91 Ga. 734 (17 S. E. 990, 44 Am. St. R. 63) ; *O'Shields v. State*, 125 Ga. 310 (54 S. E. 120) ; *Mize v. State*, 135 Ga. 291 (69 S. E. 173). It is insisted, however, that the principle of law which entitles a parent to protect and defend his minor daughter from an intended or progressing wrong of debauchery, and, under such circumstances deprives the wrongdoer of his right of defense, was not applicable to the evidence: that if the accused was guilty of the criminal act of fornication with the minor daughter, it was over before the father appeared on the scene, and that the assault which the father made on the accused was not in protection or defense, but in punishment of a past wrong, and therefore the accused had a right to defend himself from the assault and attack of the father. In *Drysdale v. State*, supra, it is held that "a husband may attack for intimacy with his wife in his presence, raising a well-founded belief that the criminal act 'is just over, or about to begin,' and the adulterer, though in danger, has no right to defend himself by using a deadly weapon." In *O'Shields v. State*, supra, the expression, "just over, or about to begin," was construed to refer to a state of facts and circumstances which left doubtful in the mind of the husband the stage of the proceedings which his arrival interrupted. The facts and circumstances of this case proved very clearly that a criminal act had been committed or was intended. Whether it was "just over, or about to begin," was not so clear; but the circumstances were surely sufficient to justify in the mind of the father a doubt as to the "stage of the proceedings his arrival interrupted." Where a father finds his 17-year-old daughter in a vacant house alone at night, away from any near-by habitation, in company with a man fully armed for any emergency, and she immediately flees from the scene, we think the law would be very lenient with the father, and readily give him the benefit of any doubt that the incriminatory circumstances might raise in his troubled and outraged mind. We think the facts and circumstances authorized the trial judge to charge the principle laid down in the *Drysdale* case, supra, as interpreted in the *O'Shields* case, supra.

It is insisted that the trial judge, in this connection, committed the same error for which the Supreme Court granted another trial in *Brown v. State*, 135 Ga. 656 (70 S. E. 329). There are two reasons why this contention is not sound: First, the evidence

in this record is substantially different from the evidence on the former trial. Here the minor daughter was found under the circumstances narrated above, with the accused, in an old vacant house, some distance from any other habitation, and the circumstances left in doubt the question whether the act of debauchery was "just over, or about to begin." According to the evidence on the former trial, the girl was found in the road, talking to the accused, and a third person was nearby, and there could have been no doubt that if any immoral act had been committed it was completed before the decedent appeared on the scene; for the only inference deducible from the evidence on the first trial was that the immoral act, if it occurred, took place before the accused and the girl left the old house, and the homicide took place in the road near the old house. The second reply to this contention is that the jury in the first trial deprived the accused entirely of his right of self-defense, and found him guilty of murder. On this trial, while they concluded that he was not entirely justifiable in defending himself from the attack of the father, they yet reduced his offense to manslaughter, because of such attack.

5. The right given by the statute to the accused "to make to the court and jury such statement in the case as he may deem proper in his defense" is strictly a personal right. He can write it out and read it to the jury, or he can make it orally; but he must read it or speak it. He can not delegate this act to his attorney. There are several reasons why it might in some instances defeat the ends of justice, by misleading the jury as to the truth, if the statement of the accused could be read by his attorney. The arts of expression frequently give undue weight to words. It is said of the great preacher, Whitefield, that he could thrill an audience by a most insignificant word. Even his interjections, his "Ah!" of pity, and his "Oh!" of appeal to the sinner, were words of tremendous power, and formed a most effective weapon in his pulpit artillery. The actor, Garrick, himself a marvelous master of expression, said that he would "give a hundred guineas if he could utter the word 'Oh!' as Whitefield did." And so an eloquent attorney, by potent elocution and a trick of emphasis, when speaking as the accused, might in some cases, by the mere utterance of the words, "Gentlemen of the jury, before God I protest my innocence," mislead them into thinking that he

was really speaking the truth. And, on the other hand, the hesitating manner of one on trial, caused by consciousness of guilt, sometimes of itself would indicate to the jury the truth. The statute, however, is so explicit that it is hardly necessary to give any reason in support of the opinion here expressed. There was no error in refusing to allow the attorney for the accused to read his statement to the jury, although he avouched it as in truth his statement, and although it was admitted that, at the previous trial, he made the statement proposed to be read by his attorney, and that it was correctly taken down and written out by the official stenographer. The accused was not deprived of his right by this ruling. The judge informed him of his right, and he availed himself of it.

We have given to this case most careful consideration, and are satisfied that no error was committed, and that the verdict was as favorable to the accused as, under the law and the evidence, he had the right to expect.

Judgment affirmed.

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3580. JONES v. THE STATE.

1. "The courts judicially know that the term 'greenback' is the popular name used to designate a certain species of the currency of the United States."
2. The evidence amply authorized the verdict of guilty, and no error of law appears.

DECIDED NOVEMBER 7, 1911.

Indictment for robbery; from Dougherty superior court—Judge Frank Park. June 5, 1911.

Rebecca Jones was convicted of robbery. The evidence introduced by the State tended to show that she had conspired with certain others to entice the prosecutor under a railway trestle, where he was robbed of \$135. She admitted her presence at the robbery, but denied that she took part in it. She stated that she and the prosecutor were passing under the trestle, when he was robbed by others, and that as soon as they grabbed him she broke and ran. There was also evidence from which the jury could have found an alibi. The man who was robbed identified the defendant as the one who had enticed him under the trestle, and testified that before they got there she waited until one of the men, who she says

did the robbing, could join them. He testified, also, that she participated in the actual robbery.

R. J. Bacon, for plaintiff in error.

W. E. Wooten, solicitor-general, *F. A. Hooper*, contra.

RUSSELL, J. 1. The man robbed testified as follows: "I was robbed of \$135 of lawful money. It was greenback money, and would pass. It was my individual money, and it was all paper money, greenbacks in fives and tens." It is claimed that there is a variance in this proof from the allegation in the indictment, which charged the robbery of \$135 of lawful money. "The courts judicially know that the term 'greenback' is the popular name used to designate a certain species of the currency of the United States." *McDonald v. State*, 2 Ga. App. 633 (2), (58 S. E. 1067).

2. The evidence practically demanded the verdict of guilty. The charge was free from error. The assignments of error based on the failure of the judge to charge the principles of law therein stated show that no written requests were submitted, and in the absence thereof the defendant can not complain.

Judgment affirmed.

3633. BUSH v. TOWN OF MINTER.

HILL, C. J. Where a petition for certiorari raised only the points that the finding of the police court was without any evidence to support it, and that the venue of the offense was not proved, and the evidence as set out in the petition clearly showed a violation of the municipal ordinance for which the accused was convicted, and that the offense was committed "within the city limits" of the municipality, there was no error in refusing to sanction the application for the writ.

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Certiorari; from Laurens superior court—Judge Martin. July 13, 1911.

Hal B. Wimberly, for plaintiff in error.

W. C. Davis, contra.

3640. MORSE v. THE STATE.

1. It is not error for the judge to charge the jury that "evidence may be autoptic proference," when the meaning of the technical words is clearly made known to the jury in plain, understandable language.
2. Whether a judge, by language used in his charge to the jury, violates the provisions of the code, by intimating or expressing an opinion as to what has been proved, will be determined in the light of the entire context; and, though it appears that the language, standing alone, might convey an intimation of the judge's opinion on one of the facts of the case, still if, from an examination of the entire context, it appears that the language was in fact hypothetical, no infraction of the statutory limitation upon the judge's power will be declared, unless, indeed, the very ambiguity of the language is such as naturally to leave upon the minds of the jury the impression that the judge was in fact intimating or expressing an opinion upon some issuable phase of the case.
3. Where, in a case involving the question as to whether a certain liquid is an intoxicating liquor, the State introduces in evidence the liquor itself, it is proper for the court to instruct the jury that they may make personal inspection of the liquid, may apply their own senses to it, may look at it, smell of it, taste of it, and thereby determine whether it is or is not an intoxicating liquor, subject to the limitation that they must not drink such a quantity as that, if it were intoxicating liquor it would make them drunk.
4. A general verdict of guilty, upon an indictment containing two counts charging different offenses, which are in fact, as well as in theory, separate transactions, can not be sustained, where there is no evidence to support a prosecution upon one of the counts.

DECIDED NOVEMBER 7, 1911.

Indictment for the sale of liquor, etc.; from Bibb superior court—Judge Felton. July 6, 1911.

Jesse Harris, C. A. Glawson, John P. Ross, for plaintiff in error.

W. J. Grace, solicitor-general, contra.

POWELL, J. Morse was tried on an accusation containing two counts, the first of which charged the sale of intoxicating liquors, and the other of which charged the keeping of liquors on hand at his place of business.

1. The first assignment of error is that the court erred in charging the jury as follows: "Evidence may be autoptic proference." Error is assigned as to this charge on two grounds: (1) that the statement is abstractly incorrect; and (2) that it is misleading. Considering these points in reverse order, we may say (to borrow a Hibernicism from the private vocabulary of an ex-Justice of the Supreme Court of this State) that the language excepted to is neither leading nor misleading.

As to the other objection—that the language is abstractly incorrect—if incorrectness from a legal standpoint is intended, the objection may be disposed of by citing Wigmore on Evidence, § 1150 et seq. If philological incorrectness is referred to, the objection is more tenable; for, while “autoptic” is a good word, with pride of ancestry, though perhaps without hope of posterity, the word “proference” is a glossological illegitimate, a neological love-child, of which a great law writer confesses himself to be the father (see Wigmore on Evidence, § 1150, note 1). Despite all this, we can not brand the statement as reversible error. This court is rather liberal in allowing the judges on the trial bench the privilege of big words. Cf. *G. v. F. & A. R. Co. v. Sasser*, 4 Ga. App. 276 (61 S. E. 505), wherein we refused to reverse the judgment because a judge of a city court used the word “obvious” in his charge to the jury.

Now, lest our manner of treating this exception be regarded as a reflection upon the very able judge of the superior court whose language is under review, let us hasten to explain that the language is all right—that to quote the excerpt alone does him injustice. During the progress of the trial, certain bottles and their contents had been introduced in evidence and were given the jury for their consideration, and the necessity was upon the judge of explaining to the jurors what use they could make of this class of testimony. As to such evidence the older writers used the phrase “real evidence;” but Professor Wigmore, in his wonderful treatise, has pointed out that this is not an accurate expression, and has coined a new phrase, “autoptic proference,” to express it. Following Wigmore, Judge Felton used this expression, and then most clearly explained and illustrated to the jury, in plain, simple, homely language, just what the big words mean.

2. The next assignment of error is that the judge, in making this explanation and in applying it to the facts of the present case, intimated or expressed an opinion as to one of the essential elements of the case. Vast quantities of what purported to be intoxicating liquors were found in and about the defendant's place of business. Along with the other evidence, the State introduced two baskets containing half-pint bottles, some labeled “rye whisky,” some “gin,” and some “peach brandy,” and containing liquors resembling in color and odor the intoxicating liquor indicated by the labels on the respective bottles; also a barrel similarly filled. The

defendant introduced no testimony, and made no statement in his own behalf to the jury; but he did contend, through his counsel, that the State had not proved that the contents of the bottles were in fact intoxicating liquors. The judge charged the jury that the State had introduced this physical evidence as "autoptic proference;" that the jury had the right to examine it, and, from an examination thus personally to be made by the jurors, determine whether the bottles in fact contained intoxicating liquor or not; and, in this connection, the court said to the jury: "In this case the State has presented in court that which the State claims is whisky. You have a right to examine it, and look at it, and test it, and determine for yourselves whether or not it is whisky. It has been offered for that purpose, and you have a right to so examine it. . . . It is brought into court in order that the jury may have an opportunity of determining, by the application of their own reason and judgment, that that which the State contends is a fact, to wit, that this evidence offered here is, in point of fact, whisky. You have a right, and the State has given you the opportunity, to determine it. I don't mean by that that you have a right to go out there and get drunk on this; I have no reason to presume any such men would do any such act."

The specific contention is that the judge, by the use of the words, "I don't mean by that that you have a right to go out there and get drunk on this; I have no reason to presume any such men would do any such act," intimated the opinion that if the jury drank enough of the liquor, they would get drunk, and, therefore, the opinion that the liquor was intoxicating. At first blush, the point appears to be well taken; but, when it is considered in the light of the whole context (that portion of it which has just been quoted, as well as other portions not quoted), we are not certain that the criticism is well taken. The judge was speaking from a hypothetical standpoint, and was endeavoring to convey to the minds of the jury, by a series of illustrations, what use they might make of the physical evidence before them. His statement, properly construed, was simply equivalent to his saying to the jury that wherever the State contends that a certain liquid introduced in evidence before the jury is whisky, and the accused contends that it is not, the jury would have the right to look at it, smell of it, and taste of it, but not to put it to the test of drinking such a quantity of

it as that, if it were an intoxicating liquor, it would make them drunk. Of course, one way of determining whether a liquid could intoxicate or not would be to drink a quantity of it and see whether it produced that effect, and the judge was merely explaining to the jury that this test, while perhaps a logical one, was so inconsistent with their duties as jurors that no reasonable man would probably conclude that he, while serving as a juror, would have the right to make it. If this is a correct construction to put upon the judge's language, there was no error in it. However, it will not be necessary for us to rule upon it directly and concretely, for the reason that a new trial is to be granted in the case upon another ground, and it is not at all likely that exactly the same words will be used again; and if there be any such ambiguity in the language as that it would as likely mislead the jury into thinking that the judge was expressing an opinion, it is not likely that the same words will be used again, since attention has been called to the matter.

3. One of the exceptions in the record challenges the correctness of the instruction, so far as it lays down the proposition that the jurors have the right to inspect, smell, and taste a liquid introduced in evidence before them for the purpose of determining whether or not it is intoxicating liquor. We realize that some courts of high standing have held that the jurors can not make any such tests. Some courts say that the jurors may look at it and smell of it, but not taste of it. We believe the true rule to be that they may do all these things. We can not see why the sense of taste or the sense of smell does not stand upon the same footing in this respect as the sense of sight. As to the determining of the nature and character of some physical things, the sense of sight may be the superior; but as to liquors it is not. With some men the sense of smell is as to liquors the most accurate; with others, the sense of taste. After more or less practical experience, a person with any fair sense of smell can determine, not only whether a liquid is or is not whisky, but also, with a very fair degree of accuracy, what kind of whisky it is, what grade of whisky it is, and what its constituent elements are; that is to say, the approximate ratio, if it be a blend, in which different kinds of liquids have entered into its preparation. It is certainly in the interest of truth—the supreme object of all legal investigation—to let the jurors, who are the final arbiters of

the question, apply to its solution the most accurate sense they are capable of applying. In this connection, however, a limitation must be noticed as to liquids claimed to be intoxicating. The very nature of the juror's office and of the effects produced by intoxication make it inappropriate, and, indeed, illegal, that the jury should apply the supreme test of drinking such a quantity of the liquor as to make themselves liable to intoxication, if it in fact be of an intoxicating character.

In this connection, one of the present Justices of the Supreme Court tells an amusing incident which occurred during his administration upon the trial bench. A case came before him for trial, involving the question as to whether certain almonds, which had been delivered upon a contract of sale, came up to sample. There were introduced in evidence two little sacks of almonds, one containing the sample and the other containing almonds taken from what had been delivered or tendered upon the contract. The judge learnedly instructed the jury as to how they should proceed with their consideration of the testimony, and instructed them upon the duty of "digesting" all the evidence and thus reaching a true verdict. They stayed out all night, and next morning came in with a verdict. As the jury filed in and indicated their willingness to report, the judge directed the foreman to hand all the papers in the case, together with the exhibits, to the clerk. The foreman replied, "Your honor, here are all the papers, but the jurors got hungry last night and digested the exhibits." This illustrates that the jurors must not make too free a use of the real evidence before them for their consideration. It must be kept in mind, too, that there is a great difference between allowing the jurors to exercise their primary senses of sight, taste, smell, etc., upon real objects introduced before them, and allowing them to make experiments (and to drink the liquor, to see if it be intoxicating, is an experiment) with these objects during their deliberations out of the presence of the court.

There are a number of other assignments of error upon the charge of the court, but we need not discuss them in detail; for they present no new questions, and none of them are meritorious.

4. There is, however, a compelling reason why a new trial should be granted. As we have already said, the indictment contained two counts—the one charging an illegal sale of liquor, and the other

charging the keeping on hand of intoxicating liquor at the defendant's place of business. The jury found the defendant guilty upon both counts; that is to say, they returned a general verdict of guilty, which means in such cases guilty upon both counts. The evidence is overwhelming, so far as the defendant's guilt on the second count is concerned, but there was no evidence whatever as to a sale. The proof would have fully justified a finding (if such an issue had been before the jury) that the accused had the liquors for the purpose of illegal sale; but proof of mere preparedness to commit a crime is not sufficient proof to show that the crime has in fact been committed. The conviction upon the first count can not be sustained. This being so, the verdict is without evidence to support it. The error is not harmless, for under the indictment and the verdict the defendant could be sentenced to the maximum punishment for each offense, and the sentences might be made cumulative. The two counts stand just as if they were two indictments; and the right to impose sentence, where the verdict is general in such a case, is the right to sentence as for two separate and distinct offenses. The law in this respect is well established. *Hall v. State*, 8 Ga. App. 747 (70 S. E. 211); *Tooke v. State*, 4 Ga. App. 495 (61 S. E. 917); *Driver v. State*, 112 Ga. 229 (37 S. E. 400).

Judgment reversed.

3641. COKER v. CITY OF TIFTON.

HILL, C. J. 1. Questions involving the validity of a municipal ordinance and the jurisdiction of the trial court, not made in that court, and raised for the first time on certiorari in the superior court, will not be considered by the latter court, or by this court. *Sutton v. Washington*, 4 Ga. App. 30 (60 S. E. 811); *S., F. & W. Ry. Co. v. Hardin*, 110 Ga. 433 (35 S. E. 681).

2. No error of law appears, and the verdict fully supports the finding of the trial court.

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Certiorari; from Tift superior court—Judge Thomas. July 22, 1911.

J. B. Murrow, J. J. Murray, for plaintiff in error.

Fulwood & Murray, contra.

3669. WILSON v. THE STATE.

- HILL, C. J. 1. The indictment in this case was not duplicitous. It set forth the offense as defined by section 513 of the Penal Code (1910), and did not include the offense as defined by section 522. The allegations were sufficient in form and substance, and the demurrer was properly overruled.
2. An indictment under section 513 of the Penal Code (1910) need not allege the ownership of the "railroad train, locomotive, car, coach, or vehicle" which was being used and run on the railroad-track when it was wrecked or attempted to be wrecked, nor is it necessary to allege and prove the ownership of the railroad-track. It was sufficient to allege and prove that the railroad train, locomotive, car, or coach was "passenger train No. 2 of the Georgia Railroad, which was then and there being used and was on the railroad-track of the Georgia Railroad for the purpose of travel and transportation." Testimony that the Georgia Railroad was a corporation was wholly immaterial, and there was no error in excluding it. *Walker v. State*, 97 Ga. 213 (22 S. E. 528); *Turner v. State*, ante, 18 (71 S. E. 604).
3. The evidence was direct as to the commission of the offense and the identity of the accused as the offender, and the court was not required to charge on the probative value of circumstantial evidence because, in addition to the direct evidence, there were also circumstances indicating guilt. *Bivins v. State*, 5 Ga. App. 434 (63 S. E. 523), and cases there cited.
4. The evidence supports the verdict, and no error of law appears.

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Conviction of attempting to wreck train; from Warrar superior court—Judge Walker. July 20, 1911.

The indictment charged Wilson with "the offense of felony—attempting to wreck train, for that the said . . . Wilson, in the county aforesaid, on the 19th day of January, . . . 1911, with force and arms, did unlawfully attempt to wreck a railroad train, locomotive, car, coach, and passenger train No. 2 of the Georgia Railroad, which was then and there being used and run on the railroad track of the Georgia Railroad for the purpose of travel and transportation, and which was then and there in motion and moving in the direction of Augusta, Ga., from Atlanta, Ga., and same was done then and there by placing a long piece of iron and a cross-tie, a piece of wood, on and across said railroad track, a point on said railroad track between Camak, Ga., and Mesena, Ga., contrary to the laws of said State," etc. The defendant demurred to the indictment generally, and on the ground that it charged two separate and independent offenses in the same count. Exception is

taken to the overruling of the demurrer, and also to the refusal of a new trial. The motion for a new trial was based on the grounds that the verdict was unsupported by evidence, that the court erred in not charging the jury in reference to circumstantial evidence, and that the court erred in refusing to allow the engineer of the train in question to testify, in response to a question propounded by counsel for the defendant, that the railroad on which the obstruction was placed, and on which he was running the engine at the time alleged in the indictment, was the property of the Georgia Railroad and Banking Company, and was operated by the Louisville and Nashville Railroad Company and the Atlantic Coast Line Railroad Company as lessees; the court rejecting this testimony on the ground that it was immaterial and irrelevant.

M. L. Felts, for plaintiff in error.

Thomas J. Brown, solicitor-general, *E. P. Davis*, contra.

3671. RHODES v. THE STATE.

If one whose premises are invaded by a riotous mob, who lay siege to his habitation and continue their rioting, shoots into the mob and wounds one of its members, he does not commit the offense of assault with intent to murder; and this is true irrespective of any racial difference between the parties.

DECIDED NOVEMBER 7, 1911.

Indictment for assault with intent to murder; from Greene superior court—Judge James B. Park. July 24, 1911.

Joseph P. Brown, *Brown & Shipp*, for plaintiff in error.

Joseph E. Pottle, solicitor-general, contra.

POWELL, J. For purposes of the ruling which we are going to make, the facts of this case may be stated as follows: A white boy had struck a negro boy with a rock. On a subsequent night a crowd of negro men—some six to ten of them—organized themselves into a party, and, without any warrant or authority, went out hunting for the white boy. They went to various houses of white persons in the community, where the boy who did the striking with the rock was supposed to be, but where, in fact, he was not, took white men out of their houses, and compelled them to go with them, fired pistols, made riotous noises, and finally came to the home of the defendant, a white man, at whose house he and a num-

ber of friends he had called in were sitting quietly, reading. They demanded that he come out, and when he refused to do so, surrounded the house. Some one within fired on the party outside, and several shots from the outside party were fired toward the house. After the besieging party had remained around the house for about 30 minutes or more, and after one branch of their party had brought the defendant's brother on some pretext to this place, and when, in his endeavor to escape, he had been shot at and mortally wounded, some one within the house, alleged to have been the defendant, fired a shotgun, hitting one of the negroes in the leg; and for this offense, under these circumstances, this defendant has been convicted of assault with intent to murder.

Now, let him who will cry out "Impossible!" "Monstrous!" "Unheard of!" or what he pleases. The only difference in the supposititious case which has just been stated and the case at bar is that it was a negro boy who struck the white boy with a rock, and that it was a white crowd who were spreading terror among the negroes, and that the defendant is a negro, and not a white man, and that the man who was shot is a white man, and not a negro. It would be folly to speak of the equality of all men before the law, if we should allow this conviction to stand. We would have to write a racial exception into that section of the code (Penal Code (1910), § 72) which provides that it shall be justifiable to shoot, and even kill, to prevent a forcible attack and invasion upon the property or habitation. These white men, or boys, as the case may be (for the record does not disclose their ages), had no right whatever to enter upon this defendant's premises in the riotous and tumultuous manner in which they did. Their excuse that they were out hunting for a negro boy who had hit a white boy in nowise mitigates their offense, which, under the law, was nothing less than riot. They were not officers; they had no warrant; the person for whom they were looking was not even upon the premises of the defendant; and no reasonable cause whatever for suspecting he was there was shown. It was error even for the court to submit to the jury instructions on the subject of right to arrest without warrant, for no such issue was raised by the evidence. It is very probable that this instruction induced the jury into rendering the verdict which strikes us as so manifestly wrong.

Judgment reversed.

3675. HARRIS v. THE STATE

- HILL, C. J. 1. If one of the jurors who convicted the accused was the first cousin of the prosecutor, this would be a valid ground for a new trial, provided the fact of relationship was unknown to the accused and his counsel at the time of the trial (*Brown v. State*, 28 Ga. 439; *Bullard v. Trice*, 63 Ga. 165), and provided, further, that this ground of the motion be shown to be true, either by accompanying affidavits or by recitals in the motion, verified by the trial judge. In this case the fact of the relationship is not shown, and the trial judge expressly refuses to verify the recital of the fact of the relationship in the motion for a new trial.
2. In a prosecution for the sale of intoxicating liquors, where only one sale was proved, and the character of the accused was not put in issue, it was improper for the solicitor-general, in the concluding argument, to refer to the accused as "this notorious character, this notorious blind tiger;" and, on objection made to such language, it was the duty of the judge to reprimand the solicitor-general and instruct the jury to disregard the improper reference to the accused. *Miller v. State*, 8 Ga. App. 540 (69 S. E. 922). Where, however, the improper language is used and objected to, and the judge stops the solicitor-general and reprimands him in the hearing of the jury, by saying, "Mr. Solicitor, that is an improper argument," and counsel for the accused make no request to the court, either to declare a mistrial or to instruct the jury to disregard the improper language, and rests content with the reprimand as made, a new trial will not be granted on this ground.
3. The testimony admitted over objection was wholly irrelevant, immaterial, and harmless. The verdict is supported by the evidence, and no error of law appears. *Judgment affirmed.*

DECIDED NOVEMBER 7, 1911.

Accusation of sale of liquor; from city court of Greenville—Judge Revell. August 5, 1911.

N. F. Culpepper, for plaintiff in error.

J. E. Justiss, solicitor, contra.

3687. FITZGERALD v. THE STATE.

1. A house may be a "lewd house," within the purview of section 382 of the Penal Code (1910), which makes it criminal for any person to maintain a lewd house or place for the practice of fornication and adultery, though the house may be devoted chiefly to the carrying on of some other vocation (a boarding-house or hotel, for example), if lewd women are accustomed to frequent there and to carry on their practices therein.
2. In order to convict an innkeeper of maintaining a lewd house, on the theory that, along with other guests, he allows lewd women to stop at his inn and ply their vocation, it is necessary to show that the innkeeper

had knowledge, actual or implied, of the unlawful practices that were going on. Such knowledge may be shown directly or circumstantially, and, where the accused himself was in personal charge of the inn, one of the methods by which he may be charged with this knowledge is to show that his house had acquired a general reputation in the community of being a place in which fornication and adultery were commonly practiced; the sufficiency of such testimony being for the jury.

3. It is no ground for the exclusion of the testimony of one who swears that he knows the general reputation of a house, or of a person, as to lewdness, that he can not tell the number of persons whom he has heard speak of the matter, or give the names of those from whose conversation he has gained his knowledge of the general reputation as to which he testifies. His examination and cross-examination go to the jury together, to be given such weight as it seems to them to be entitled to under all the circumstances disclosed by his testimony as a whole.
4. "The hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted." Words may constitute conduct, and, when that conduct is otherwise relevant in the case, the fact that the person used these words may be proved, notwithstanding the ordinary rule against the admission of hearsay.
5. It is not necessary, in order to make out the offense specified in section 382 of the Penal Code (1910), that the State should show any particular act of fornication or adultery to have been committed, if the evidence, either directly or circumstantially, is such as to satisfy the jury that the house was kept and maintained as a lewd house; that is, if, notwithstanding lack of proof as to any particular act, the circumstances are such as to satisfy the jury that the practice of fornication and adultery actually went on in the house.

DECIDED NOVEMBER 7, 1911.

Accusation of keeping lewd house; from city court of Valdosta
—Judge Cranford. August 18, 1911.

Whitaker & Dukes, E. K. Wilcox, for plaintiff in error.

James M. Johnson, solicitor, contra.

POWELL, J. The defendant was indicted for violating section 382 of the Penal Code (1910), which makes it a misdemeanor for any person "to maintain and keep a lewd house or place for the practice of fornication or adultery, either by himself or others." The State relied on what is the usual method of proof in such cases, namely, proof by witnesses that the house in question had a general reputation of being a lewd house, and that certain women who lodged there from time to time had a general reputation of being lewd women, supplemented by proof of certain specific acts of conduct which took place from time to time, and which were indicative of the fact that fornication was probably going on in the house. Only one act of sexual intercourse was directly proved, and it was

not shown that the defendant personally knew of this act. The house in question was operated by the accused as a restaurant and lodging-house, or a cheaper form of hotel. The proof showed that some good people lodged there from time to time, and that some lewd women stayed there at periods of greater or less duration. The defendant and his son personally conducted the house and looked after the comfort of the guests.

1. One of the points stressed in the argument raises the question as to whether a house devoted chiefly to other purposes may also be a lewd house, within the purview of the statute. It is insisted that merely for an innkeeper to furnish lodging to guests of a lewd character, who, with his knowledge or by his connivance practice fornication in the house during their stay there, more or less transient, does not render the proprietor indictable for maintaining a house for the practice of fornication. We think that a house may be a lewd house, within the purview of the statute, although it is devoted also to other purposes; and if an innkeeper furnishes lodging to lewd guests, and allows them, with his knowledge or acquiescence, to carry on their unlawful practices in his house, he is guilty of violating the statute, notwithstanding the greater portion of his guests may be decent people, and notwithstanding the greater portion of the business carried on in the house may be of a legitimate nature.

2. In order to convict the proprietor of a lodging-house of maintaining it as a lewd house, it is necessary to show, directly or circumstantially, that he knew of the lewd practices which were going on therein, or, if he did not positively know of them, that he was in possession of such facts as to charge him with what is commonly known as "constructive knowledge." He can not shut his eyes to what is going on around him, for the purpose of avoiding knowledge, and then defend on the ground of his lack of knowledge. The plaintiff in error contends that the evidence was insufficient to charge him with knowledge in the present case; no actual knowledge being directly shown. After carefully reading the record, we can not sustain this contention. In the first place, it is shown that the house had achieved a general reputation in the community of being a lewd house, and that the accused himself personally conducted the place. This alone would be sufficient to authorize the jury to believe that he had such knowledge of the situation as to

charge him with culpability. The most common method of making out a *prima facie* case against a person for maintaining a house of this kind is to show that the house bears such a general reputation in the community, and that the accused, being the proprietor, was a member of the community. Proof of this kind alone has been held sufficient to convict, doubtless on the theory that a person living in a community would hardly be ignorant of a condition which relates to his own affairs and which has become so public and notorious as to be a matter of common information. It is possible, though hardly probable, that such a course of conduct could habitually take place in a house which a person was managing as to call the attention of the community to its lewd character, and as to make it a matter of general reputation in the community, without that person knowing something of this conduct. At any rate, it is almost always considered by the courts as sufficient proof to convict (so far as this element of the case is concerned) to show that the house bears the general reputation of being a lewd house. Besides that, in this case there were certain transactions between women and men which occurred in the presence of the accused, and which ought to have informed any reasonable man that his house was being used for purposes of prostitution. Indeed, in the light of all the evidence, it is hardly probable that the things which the witnesses swear took place could have occurred without a reasonably watchful innkeeper knowing that lewd women were making a resort of his house for the purpose of carrying on their practices.

3. A motion was made to exclude the testimony of a certain witness, who, on direct examination, had testified that the reputation of the house was bad, and that the general reputation of the women who stayed there was that they were lewd, and, on cross-examination, testified that he had heard people on the streets talking about it; that he could not tell how many, but that he was sure there were as many as half a dozen, and maybe more; that he could not be exact as to how many; and that he knew nothing of the place of his own knowledge. The objection to this testimony was that the witness disclosed that he did not have such a knowledge of the general reputation of the place as to make his testimony admissible on that subject. We think that his testimony was properly admitted. The witness qualified by stating that he knew the general reputation. This rendered his testimony *prima facie* admis-

sible. It was allowable for the accused, on cross-examination, to show the extent of his knowledge as to the general reputation, and if the cross-examination had disclosed that he had no knowledge of the general reputation of the place, it would have been the duty of the court to exclude the testimony. We do not think that the cross-examination was such as to disclose the witness's lack of knowledge of the reputation of the place.

General reputation is what people in a community commonly say as to a thing. A person may know it, without having talked to very many in the community. He may know it without being able to give the names of any great number of persons with whom he has conversed on the subject. For instance, there are many of us who know that this man or that bears a good or bad general reputation in the community, and yet, if we were called upon to give the names of those persons with whom we had discussed the character of the person in question, we would find it difficult to furnish the names. The common consensus of popular opinion on the subject may be firmly fixed in our minds, though we have forgotten or are unable to recall the separate transactions or conversations from which we gained our knowledge of the matter.

4. The court permitted a witness to testify, that he was on a train one day coming into Valdosta (where the house in question was); that he sat on a seat by himself; that a woman came up and engaged him in conversation, and asked him where he was going; that he told her that he was going to Valdosta; that she said she was going there, too; that he asked her if she was going to visit relatives; that she said, "No," she was up "on a pleasure trip," and stopping at the defendant's house; that she then said "I charge \$2 for my pleasure." He further testified that when the train reached Valdosta the woman got off and did in fact go to the house of the defendant. This testimony, so far as it related to the conversation on the train, was objected to on the ground that it was hearsay, and the court overruled the objection. One of the ways of proving that a house is a lewd house is to prove that it is frequented by lewd women. Of course, for a lewd woman to go to a house on a single occasion would not characterize it as a lewd house; and if this evidence, which was objected to, stood alone, there would be no doubt that it would be wholly inadequate to authorize a conviction. It would be necessary to show many other things, one

of which would be knowledge, actual or constructive, on the part of the accused that this woman who went to his house was a lewd woman. This testimony, if admissible at all, was only a link in the chain of circumstantial evidence. It must be remembered, however, that the State would be permitted to show by a number of different witnesses that on a number of separate occasions individual lewd women went to the defendant's place, for the purpose of showing that they went there in such numbers as that he must have known that his house was being used as a lewd resort. Therefore the real point raised by the objection before us for decision is whether the woman's language, used on the train, could be proved for the purpose of showing that she was in fact a lewd woman.

The defendant contends that her conversation (in the absence of the defendant) could not be proved for the purpose of showing the lewdness of her character—that it was mere hearsay. As Professor Wigmore says in his work on Evidence (section 1768): "The prohibition of the hearsay rule, then, does not apply to all words or utterances merely as such. If this fundamental principle is clearly realized, its application is a comparatively simple matter. The hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted." Words, like acts, may constitute conduct, and the expression "verbal acts," is not uncommonly found, and it is used to express the notion of words having probative value as conduct. Now, if this woman in question had been guilty of lewd conduct on the train, had committed such acts as in the minds of all reasonable men would have characterized her as a whore, certainly the State could have proved those acts, though committed outside of the defendant's presence, for the purpose of showing that she was a lewd woman, and could have coupled this with other evidence showing that this woman, thus proved lewd, had subsequently stayed in the defendant's house. Indeed, in the present case, the State proved the lewdness of a number of boarders at the defendant's inn by showing that they had previously resided in known lewd houses, and counsel seem to have conceded that this form of proof was allowable. The language a woman uses may tend to characterize her as a whore with almost the same certainty as lascivious conduct short of the very criminal act itself. To the

ordinary man's mind, for a woman to approach him and to solicit him to have sexual intercourse with her for money would prove her character as a public prostitute, just as much as it would for her to be seen in a lewd house, or to be seen making any of those lascivious displays of herself which are commonly understood as portraying the arts and artifices of a whore. The State in this case puts in evidence this woman's words, in which she says to a stranger, whom she approaches upon the train, that she sells what she called "her pleasure" for \$2, not for the purpose of proving as the ultimate fact that the woman did sell "her pleasure" for \$2, but for the purpose of proving the character of the woman who thus used language consistent only with the abandoned state of mind of the public prostitute. We think that in this view of the case the evidence was admissible as verbal conduct, as a link in the chain of circumstances by which the guilt of the accused was to be proved. Furthermore, even if there be any doubt about the soundness of this conclusion, the result would be the same; for the admission of this testimony, even if erroneous, is, in the light of the whole testimony in the record, merely such an immaterial incident upon the trial as not to require a new trial.

5. Exception is taken to the following charge of the court: "It is not necessary, in order to make out the offense charged, that the State shall prove that any particular act of fornication or adultery was committed, if you are satisfied that the house was kept as a lewd house." Counsel cite *Coleman v. State*, 5 Ga. App. 766 (64 S. E. 828). In that case the court charged the jury that "it is not necessary for the State to prove that there were acts of adultery or fornication committed at such house." The court further charged the jury that "it would be sufficient if the State proves to your reasonable satisfaction that she [the accused] bears the general reputation of being a lewd woman, and that the house or place kept by her bears the general reputation of being a lewd house or place of prostitution, and that the women there at that house bear the general reputation of being lewd women, and that men were seen to frequent the place by day and by night." This court held that the charge just quoted was erroneous, that it was necessary for the State to prove that acts of adultery and fornication were committed at the house, and that it was not sufficient for the State merely to convince the jury that the house or the women bore the

reputation of being lewd. We pointed out that the ultimate thing which the jury were required to find, before they could lawfully convict the defendant, was that the house was devoted to the practice of adultery or fornication, and that while that fact may be proved by the reputation which the house and its inmates bore, together with corroborative circumstances, and without proof of specific acts of adultery or fornication, still that unless the jury, from this reputation and the other corroborative circumstances, believe that the practices referred to really went on, they would not be authorized to convict. It seems to us that the present charge very clearly conveyed to the minds of the jury the exact distinction which the court made in that case, namely, that they could convict, though the State did not prove any particular act of fornication or adultery, if the evidence satisfied them that the house was kept and maintained as a lewd house; that is to say, as a house in which fornication or adultery was actually practiced. The *Coleman* case and the cases therein cited clearly show that a conviction may be had in such cases without proof of any particular act of fornication or adultery, and that to show that a house is maintained and kept as a lewd house is sufficient to authorize the jury to believe that, despite the State's failure or inability to show a particular act, the unlawful practice was nevertheless carried on. After carefully considering the alleged errors, we find no reason for the granting of a new trial.

Judgment affirmed.

3693. *MATHIS v. THE STATE.*

HILL, C. J. The circumstances relied upon to support the verdict, weighed most strongly against the accused, are not incriminatory in character, and are only sufficient to raise a suspicion of guilt; and suspicion alone, however strong and apparently well founded, has no probative value as evidence, and a verdict based thereon, without more, is contrary to law.

Judgment reversed.

DECIDED NOVEMBER 7, 1911.

Indictment for larceny from house; from Floyd superior court
—Judge Maddox. August 19, 1911.

Sharp & Sharp, for plaintiff in error.

John W. Bale, solicitor-general, contra.

3701. WOOTEN *v.* THE STATE.

POWELL, J. The exceptions to the charge of the court are not well taken. Under the State's testimony, the homicide was strongly mitigated, but not entirely justifiable; under the defendant's statement, it was justifiable. The jury accepted the State's theory of the transaction, and convicted the accused of the offense of voluntary manslaughter. There being some evidence to support the verdict, this court has no power to set it aside. *Judgment affirmed.*

DECIDED NOVEMBER 7, 1911.

Indictment for murder; from Rabun superior court—Judge Jones. August 4, 1911.

T. L. Bynum, R. E. A. Hamby, W. S. Paris, for plaintiff in error.
Robert McMillan, solicitor-general, contra.

3718. HENDON *v.* THE STATE.

In prosecutions under section 110 of the Penal Code (1910), for the inveigling of a child, it is necessary for the State to show that the accused either "forcibly, maliciously, or fraudulently" enticed or carried the child away. Where the child alleged to have been inveigled is above the age of discretion, though under the age of 18, these elements are not sufficiently made out by showing that the child went away in company with the defendant, especially where the State's own evidence shows that the child went of its own free will and accord, and not as the result of any inveigling on the defendant's part.

DECIDED NOVEMBER 7, 1911.

Indictment for inveigling child; from Cobb superior court—Judge Morris. September 9, 1911.

Clay & Morris, for plaintiff in error.

J. P. Brooke, solicitor-general, contra.

POWELL, J. This case presents about the most horrible and disgusting record we have been called upon to review since our service upon this bench began. Its disgusting details are utterly contrary to all that we are accustomed to. We have considered the case carefully. The record contains many exceptions to rulings of the court and to instructions to the jury, but none of these are well taken. The case was fairly and ably tried. We are always reluctant to set aside a verdict deliberately returned by a jury and approved by a court, on the ground that there is no evidence to support it, and are especially reluctant to do so where the record

is otherwise so free from error as the one before us. But we have read this record over and over again, and the evidence is wholly insufficient to support the conviction.

The accused was charged with a violation of Penal Code (1910), § 110, which provides: "Any person who forcibly, maliciously, or fraudulently leads, takes, or carries away, or decoys or entices away, any child under the age of eighteen years from its parent or guardian, or against his will, or without his consent, is guilty of kidnapping." The child alleged to have been inveigled was a girl about 17 years old, the daughter of a poor white farmer who lived in the country between Marietta and Atlanta. He had, as a farm hand, a negro boy, who slept in a shed-room in his house. This girl and the negro boy worked together in the field, and in some way, not disclosed by the record, he managed to become criminally intimate with her. One night, after she was somewhat advanced in pregnancy, her father missed her from home. He tracked her to a spot at a branch near by, and found that she was there joined by another woman, and then both were tracked to a point on the street-car line between Marietta and Atlanta. It was shown that the other track was that of the defendant in this case, who was a sister of the negro boy already mentioned. In fact, earlier during the same night this negro woman had come to the prosecutor's house, had called for her brother, and had told the prosecutor that she wanted him because one of her children was sick. It may be stated just here that this negro boy came back and went to work next morning, but a little later in the day fled, and has not been heard of since. The next morning after the night on which the girl was missed from her father's house, she and the defendant were seen to take a train together in Atlanta for Knoxville, Tennessee. They went together into a coach assigned to colored people. The porter seemed to suspect that the girl was a white girl, and, apparently having some curiosity as to why she should be riding with a negro woman, asked them about it, and the girl told him that she was a negro girl. At Blue Ridge, on the way to Knoxville, the negro woman gave the porter money to buy lunches, and he brought them in to the girl and the defendant. When they arrived at Knoxville, the porter consented to secure lodging for the negro woman, but refused to have anything to do with the white girl, and she went into another portion of the city and se-

cured lodgings. A little later the police arrested the two in different parts of the city.

Now, if this were all the testimony, there might be enough to justify a strong suspicion that this negro woman had decoyed this white girl away in order to shield her brother from the crime he had committed—a crime which, though punishable by only a small penalty, so far as the law is concerned, would probably have been dealt with much more severely by members of the community if once it became known. But the State did not stop there. It brought the girl herself to the witness-stand. She confessed her miserable condition, and stated on the stand that she herself had appealed to this sister of the man who had been a partner with her in her unspeakable crime, and had persuaded this woman to take her to Knoxville, Tennessee. The girl herself was ignorant and untraveled, and did not know how to get away from home. The negro boy had furnished the girl with \$13. She gave this to the negro woman and told her to purchase the necessary tickets. The understanding between them was that when they got to Knoxville, and the girl secured a lodging place, this negro woman would wait on her there. According to the girl's testimony, however, she never saw anything more of the defendant from the time they last separated at the train until after they were arrested a few days later. If the State's circumstantial evidence made out even such a *prima facie* case of kidnapping or inveigling as to put upon the defendant the burden of explaining the circumstances, the State's own testimony as it fell from the mouth of this witness, the girl herself, furnished the explanation, and absolutely destroyed whatever approach to a case the State had previously made. The defendant's own statement of the affair was similar to the girl's.

It is insisted (though there is no direct proof of the fact in the record) that this girl is weak and unlettered, and that the defendant is a shrewd and designing woman, and that the girl, even when she was testifying, was so far under the influence of this woman that she lied as to the salient facts of the case. Be this as it may, the State is not in a position to assert it here. The State could not make out a case without putting the girl on the stand, under all the circumstances. If the actual truth is different from what it appears to be according to this record, this unfortunate state of affairs comes about through the inability of the State

to show the truth—as often occurs in the ordinary administration of the criminal law. With this girl testifying as she does, we do not see how the State can make out a case, unless it obtains some further evidence than that now apparently at its command. So long as the State is under the necessity of supplementing its circumstantial evidence with the testimony of the girl, it is obliged to adopt the theory of the case shown by the girl's testimony. This proposition involves no contradiction of the doctrine that where the State has two witnesses, and one of them makes out a case and the other states facts to the contrary, the State may nevertheless ask for and sustain a conviction on the testimony of the first witness, if it is believed by the jury. The girl's testimony in this case does not contradict the circumstances by which the State makes its first approach toward a proof of the case. Her testimony is consistent with all these things—that she left her father's house when she heard the defendant call the negro boy; that she went to the branch, just as her father says she went; that she met the defendant, and that they walked to the car line; that they came on to Atlanta, and that they took the train for Knoxville; that she furnished the negro woman money which the negro boy had furnished her. All these things the girl herself directly testified to, and yet she says that she herself was the movant in the entire matter. She testified only under the compulsion of the court, at the instance of the State; but, when she did testify, she absolutely ruined the State's case.

If this woman is guilty, the State has not proved it; for it is material in a prosecution of this kind for the State to show that the defendant "forcibly, maliciously, or fraudulently" led, took, or decoyed away the child. Now, as to a child under the age of discretion, it might be sufficient merely to show that the child ran away from home and was materially assisted by the defendant in getting away. A child of tender years is not supposed to have sufficient will and judgment to direct an affair of that kind; but this girl was above the age of discretion, was about 17 years old, was about to become a mother, was in a condition that demanded action on her part, and, if she is telling the truth about it, she did what was most natural—appealed to this woman to go away with her and help her shield her disgrace. If this is all the defendant did (and it is all that the proof shows that she did), she is guilty

of no crime. The shockingness of the situation, the natural feeling that somebody ought to be punished on account of this unnatural state of affairs that was existing, doubtless led the jury to convict, notwithstanding the evidence is as we have stated it. Detestation for crime too often causes men's minds to rush to conclusions of guilt as against any one charged with complicity in the transaction. But, horrible as this affair is, there can be no relaxation of that most essential rule by which the liberty of all of us is guarded, namely, that no person shall be convicted on suspicion alone, nor held accountable to the law for a crime which the State is unable to prove by either direct or circumstantial testimony. Solely for the lack of evidence to support the verdict, the judgment is

Reversed.

3721. BRUNER v. THE STATE.

POWELL, J. This case is controlled by the principle stated in *Cheatwood v. Buchanan*, 9 Ga. App. 828 (72 S. E. 284), and in a number of similar cases.

Judgment affirmed.

DECIDED NOVEMBER 7, 1911.

Accusation of sale of liquor; from city court of Sylvester—Judge Williamson. August 28, 1911.

J. J. Forehand & Son, Bell & Causey, for plaintiff in error.

J. H. Tipton, solicitor, contra.

3726. LANGSTON v. THE STATE.

No error of law appears, and the verdict is supported by some evidence.

DECIDED NOVEMBER 7, 1911.

Conviction of voluntary manslaughter; from Cherokee superior court—Judge Morris. September 9, 1910.

Howell Brooke, Gober & Griffin, for plaintiff in error.

J. P. Brooke, solicitor-general, contra.

HILL, C. J. The facts of this case present another of the daily occurring instances showing the monstrous and measureless evil of intoxicating liquors. This hydra-headed and remorseless monster, with ceaseless and tireless energy, wastes the substance of the poor,

manufactures burdensome taxes for the public, monopolizes the valuable time of the courts, fills jails, penitentiaries, and asylums, ruins homes, destroys manhood, terrorizes helpless women and innocent children, baffles the church, and mocks the law, and, answering its inexorable demands, "each new morn new widows mourn, new orphans cry, new wrongs strike Heaven in the face." These are the products of a curse not imposed by the decree of God, but self-inflicted by the voluntary conduct of man, its weak and wicked victim. Judges of criminal courts, speaking from official experience, have grown weary in calling attention to the drink habit as the principal cause of crime, and nothing that the writer could say would add to this manifest truth. But I can not refrain from saying that, after five years' observation of the cases that have been before this court, three fourths of the crimes are due directly or indirectly to the excessive use of intoxicants, and that, if the church and the State and public sentiment could unitedly make Georgia sober, the prisons would be vacant, the chain-gangs empty, and cities, towns, and country would be filled with prosperous people and happy homes. The grand English premier did not exaggerate when he declared that "greater calamities have been inflicted on mankind by intemperance than by the three great historic scourges, war, pestilence, and famine," and that this evil is "the measure of a nation's discredit and disgrace."

We have been led to say this much because of the sad tragedy disclosed by the horrible facts of this record. A husband, "beastly drunk," goes to his home at night, finds his sick wife in bed, and, with brutal curses and violent threats to kill, drives her into the night and from home. The accused, their 19-year-old son, resents this cruel treatment of his mother, and reproaches the father for his brutal language and cruel conduct. The father, frenzied with liquor, immediately turns on his son, curses him, knocks him down with a chair, cuts him with a knife, and threatens to kill him. The son (as he contended, in self-defense, but, as found by the jury, under the excitement of passion aroused by these attacks) picks up a rock from the floor, where it was placed to prop open the door, hurls it at his father, hits him on the head, and from the wound thus inflicted death ensues on the following day.

A careful review of the evidence convinces us that it largely preponderates in favor of the plea of self-defense. Yet we can not say

that the verdict of voluntary manslaughter is not supported by some slight evidence, and to this standard of mental conviction we must come before we would be authorized to set aside the verdict on the general grounds. The evidence in support of the verdict is that the son, angered by his father's conduct, "cursed him back," did not decline the struggle and leave the house, and, according to one witness, threw the rock after he had been knocked down and cut and when his father, although continuing to curse him and threatening to take his life, was not actually advancing upon him and manifesting a present intention to carry out his threats; in other words, that it was a case of mutual combat, and the accused threw the fatal stone with David-like precision and force, angered and provoked by the previous attacks, when there was no actual or apparent necessity for him to have done so in self-defense.

We do not hesitate to state that if it were our province, or we had the right to weigh the evidence and decide the issue of fact, we would grant another trial, because the evidence in favor of the plea of self-defense is so strong, and that in support of voluntary manslaughter, or any other offense, is so weak. Entertaining this opinion of the evidence, we have most carefully examined the assignments, to find, if we could, any material legal error. We have failed in our search. The assignments of error of law consist of objections to several excerpts from the charge. Separately considered, these excerpts contain no material error, and raise no novel, doubtful, or interesting question of law. When they are examined in connection with the entire charge, we are forced to the conviction that the law was fully, fairly, and correctly presented on every issue made by the evidence.

The attending physician testified that shortly before his death the decedent had several convulsions, and he "apprehended" that death would soon follow. This opinion was admitted in evidence over the objection of the accused. We think the evidence was competent; but, even if not, its admission was harmless error. The decedent did shortly die, and, according to the opinion of the physician, his death was caused by the wound on the head inflicted by the accused.

The evidence showed that the decedent was a man of great violence when under the influence of liquor, and that he was much larger and stronger than the accused. It is contended by learned

counsel that the trial judge, without request, should have instructed the jury "as to the law touching the violent character of the deceased and the great disparity in his size and that of the accused." We have no clear opinion or exact knowledge as to what would be the law on this subject that the judge was called upon to charge, and we have received no assistance from learned counsel on this point. We are therefore inclined to think that the jury, especially where a mutual combat or struggle was shown, could be safely relied upon to deal with these questions without the aid of any rule of law. The violent character of one party, and the relative strength and size of two parties engaged in a mutual combat, or where an assault and struggle took place, so forcibly and necessarily illustrate the issue of guilt or innocence that he would be a profoundly stupid juror who would not give these questions full weight and significance, even without any suggestion from the court as to his right to do so.

We repeat that we affirm the judgment because we find no legal error in the trial, and there is some slight evidence to support the verdict. We doubt not that the learned trial judge, if he has not already imposed a merciful sentence, will do so, and will humanely temper justice with a large and generous clemency.

Judgment affirmed.

3730. WALKER v. THE STATE.

1. The evidence authorizes the conviction.
2. The charges complained of were not erroneous.
3. Under the Penal Code (1910), § 1056, where the judge is requested to put his "charge" in writing, he violates the statute, and a new trial must be granted, if he gives to the jury any instruction, not in writing, as to how they shall consider the case to be submitted to them, or how they shall make a verdict.

DECIDED NOVEMBER 7, 1911.

Certiorari; from Jasper superior court—Judge J. B. Park.
September 1, 1911.

Doyle Campbell, for plaintiff in error.

Joseph E. Pottle, solicitor-general, contra.

POWELL, J. Only the proposition stated in the third paragraph of the syllabus seems to require elaboration. Section 1056 of the

Penal Code (1910) is as follows: "The judges of the superior, city, and county courts shall, when the counsel for either party requests it before argument begins, write out their charges and read them to the jury, and it shall be error to give any other or additional charge than that so written and read." In the present case the judge of the city court was duly requested to put his charge in writing, and did so. Before beginning to read from his charge, he addressed the jury, telling them in substance that he was about to read them the charge, and that as he read it to them they should bear in mind that it was not intended as expressing or intimating any opinion of the facts of the case. This statement was omitted from the written charge.

"The words 'charges' and 'charge' in [the section quoted] of the code embrace any and all final instructions addressed by the court to the jury for the purpose of governing their action in making or aiding to make a final disposition of the case in favor of one litigant or the other." *Harris v. McArthur*, 90 Ga. 216 (15 S. E. 758). In Black's Law Dictionary the word "charge," as related to the common-law practice, is defined as follows: "The final address made by a judge to a jury trying a case, before they make up their verdict, in which he sums up the case and instructs the jury as to the rules of law which apply to its various issues, and which they must observe in deciding upon their verdict, when they shall have determined the controverted matters of fact." The term "charge" is not generally considered as embracing such rulings or directions as the court may give prior to the beginning of his final address to the jury. See *Millard v. Lyons*, 25 Wis. 516. The Georgia statute has been construed by the courts of this State a little more strictly against the judge than similar statutes in other States have been construed by their courts. In the *Harris* case, just cited, our Supreme Court held that the statute prevented the judge from directing a verdict otherwise than by a written direction, while in *Grant v. Connecticut Mutual Insurance Co.*, 29 Wis. 125, the contrary is held. Compare *Burns v. State*, 89 Ga. 527 (15 S. E. 748), holding that a mere oral direction to the jury as to the form in which they shall write their verdict was violative of the statute, with *Bush v. State* (Tex. Cr. App.), 70 S. W. 550, holding that the bare statement to the jury of the penalty authorized by the statute was not a charge within the meaning of a similar law prevailing in that State.

Still, with all this strictness with which this statute has been construed in Georgia, there are, of reason and necessity, certain directions which the court may give to a jury which do not fall within any fair definition of the word "charge." For example, suppose the evidence in a case to be over and the arguments of counsel concluded at a late hour in the day. The judge decides not to charge the jury until after supper. He turns to them and orally informs them of this purpose, and instructs them not to enter upon a consideration of the case until they shall have received his charge, and commends to them those other observances which are ordinarily commended to the jury by the judge when they are being detained not in the presence of the court. Certainly such a direction as this would not be considered as a part of the charge of the court, within the purview of our statute. Likewise, if the judge, having committed his charge to writing and being about to read it to the jury, should, prefatory to the reading of it, ask the jury to give him their careful attention. A number of similar directions can be conceived of, which would in no fair sense be considered as a part of the charge, and which would not be violative of the letter or the spirit of the law, though orally given. On the other hand, it is equally easy to conceive of instructions or directions that the court might give to the jury, though not formally or explicitly given as a part of the final charge, which would be within at least the spirit, if not the letter, of the code section. For instance, say that the judge in the supposed case mentioned above, where the judge is about to adjourn in the late afternoon for the purpose of delivering his charge after supper, should, before taking the recess, say to the jury, if the case were a prosecution for homicide, something like this: "This is an important case, one that is a little unusual, in that the testimony does not present the usual issues made in a murder case, but presents only one issue, murder or nothing; and in order that I may have time the more accurately to prepare instructions on this subject, we will now take a recess," etc. It will be seen that what is apparently a mere direction on the part of the court is in fact a substantial instruction upon the issue that will be later submitted to them; and in such a case we have no doubt that the judge violates the statute.

The direction complained of in the present instance was not

strictly a part of the charge of the court, but was a direction given preliminary and prefatory to his reading the charge to them; but it was an instruction of final nature, an address by the court to the jury for the purpose of governing their action in making or aiding to make a final disposition of the case. It was equivalent to an instruction that the jurors were judges of the facts, that the court had no inclination or intention of encroaching upon their province in this respect, and that nothing in the language about to be used should be so construed. We can not escape the conclusion that the law was violated. The statute itself, it will be noted, specifically and expressly states that "it shall be error to give any other or additional charge than that so written and read." If it were an open question, we would not hesitate to hold that this statute is not so mandatory in its terms as to prevent an application of the doctrine of harmless error; but an examination of the cases—cases absolutely controlling on this court—will disclose that we are not at liberty to take this view of the matter. Indeed, when we recall that the very object of the legislature's passing the statute was to cut out the possibility of those unseemly controversies between court and counsel as to what the court in fact did say to the jury, there is good reason for saying that the legislative object can not be accomplished unless a new trial is granted for every non-observance of the statute. There is no consistency in our requiring other men to obey the letter and the spirit of the law, irrespective of their personal views as to its wisdom, if we are not willing to follow our precepts by our example under like conditions. The law commands us to grant a new trial, and for this reason alone we do so.

Judgment reversed.

3576. HERRING v. THE STATE.

1. The evidence authorizes a conviction.
2. Ordinarily it is not cause for a mistrial in a criminal case that the solicitor-general merely tenders illegal testimony, where the court refuses to admit it, and instructs the jury not to consider it.
3. The charge of the court was not subject to the assignments of error made against it.

DECIDED OCTOBER 10, 1911. REHEARING DENIED NOVEMBER 20, 1911.

Indictment for misdemeanor; from city court of Macon—Judge Hodges. June 24, 1911.

W. D. McNeil, for plaintiff in error.

W. J. Grace, solicitor-general, contra.

POWELL, J. 1. The defendant was indicted for keeping intoxicating liquor on hand at his place of business. Liquor was found in his store, and also in an adjacent barn. His defense was that the liquor had been put there, without his knowledge or consent, by other persons. If the jury had believed the witnesses by whom the accused attempted to support this defense, they doubtless would have acquitted him; but evidently they did not believe the witnesses. We do not blame the jury for refusing to believe the testimony of these witnesses, for it carried on its face the inherent marks of falsity, and jurors are not required to believe even sworn testimony which, because of its inconsistencies, improbabilities, and contradictions, does not commend itself to the reasonable mind as being true.

2. A witness for the defendant had testified that he was a clerk in the defendant's store, and that no liquor had been kept therein since the defendant had pleaded guilty (at a previous date) of the offense of selling liquor. The State cross-examined him as to the time when his employment began, and, for the purpose of showing that he had not truly stated the length of his service, offered in evidence the former indictment against the accused. Defendant's counsel objected to the solicitor's introducing this indictment, and moved that the court declare a mistrial because he had tendered it in evidence. There was nothing in this transaction which required the grant of a mistrial. The judge did all that he was required to do when he sustained the objection to the testimony, even if the testimony was not legally admissible; but he went further and told the jury to disregard this matter entirely, and not to let it influence them in any way. Certainly the defendant will not be given a new trial for this occurrence, under the circumstances.

3. Certain criticisms are made upon the charge of the court, but, without going into details, we will simply say that there was no error, and that the defendant was fairly tried and legally convicted.

Judgment affirmed.

3394. WALLACE v. SOUTHERN RAILWAY CO.

1. Where the jury can reasonably infer, from the evidence, that an allegation of negligence which would authorize a recovery has been proved, a nonsuit should not be granted.
2. The presumption of negligence against the employer "in case death results from injury to the employee," created by the act of 1909 (Acts 1909, p. 160), is a part of the integral right to recover, and is not alone a rule of evidence, and is applicable only to causes of action arising subsequently to the passage of the act in question.

DECIDED NOVEMBER 7, 1911. REHEARING DENIED NOVEMBER 20, 1911.

Action for damages; from city court of Atlanta—Judge Reid.
September 1, 1910.

Burton Smith, R. W. Crenshaw, for plaintiff.

McDaniel & Black, for defendant.

HILL, C. J. Wallace was employed by the Southern Railway Company as a switchman, and on or about October 26, 1906, in the early part of the night, and while engaged in the discharge of his duties, he was killed by the running of an engine operated by the railway company. His widow brought suit to recover damages for the homicide. At the conclusion of the plaintiff's evidence a nonsuit was granted, and to this judgment she excepts. Illustrating the question of nonsuit, there are also two special assignments of error on the admission and rejection of testimony.

This is the second appearance of the case before this court on an assignment of error to the judgment awarding a nonsuit. When first here, this court held that the plaintiff failed to show a prima facie case of liability, and consequently affirmed the judgment. *Wallace v. Southern Ry. Co.*, 6 Ga. App. 526 (65 S. E. 299). There is some substantial difference between the allegations of negligence in the first and second petitions, but very little, if any, material difference in the evidence in support of the allegations on the two trials. In a judgment awarding a nonsuit, as nothing is decided except the sufficiency of the evidence presented in support of the allegations in that particular case, it is not deemed necessary to call attention to any difference between the allegations and evidence in the present case and in the first case. We shall only consider and decide as to the correctness of the judgment, under the allegations and the proof offered in support thereof, on the question of liability in the case sub judice. The employment by the railway company of the husband of the plaintiff as a switchman,

and the fact that he was killed in the discharge of his duties by the engine of the railway company, were not controverted, and the only question for the determination of this court relates to the issue of negligence, under the allegations of the petition and the evidence for the plaintiff.

The allegations on the subject of negligence are as follows: "In the course of his duties, deceased was switching cars in [Fulton] county, near Armour . . . at said time and place deceased threw a switch [in front of the engine] and gave a signal to the engineer to move forward. Immediately upon his giving the signal, and just as the engine was in the act of starting, a great volume of steam gushed out, surrounding the engine in every direction, and enveloping the deceased. The engine continued to advance, and ran over the deceased and killed him. . . . It is impossible for plaintiff to give any of the details from the time the steam enveloped her husband until his mangled body was found in the rear of the engine." She alleges that "the escaping steam obscured the vision of the deceased, and was so opaque that he could not see through it, and, furthermore, it stung and blinded his eyes, and it was impossible for him to see, or know direction, or tell in which direction the engine was, or in which direction he should go, or save himself in any way. She does not know and can not say whether the engine struck the deceased while he was trying to escape from it, or exactly how it happened." In this connection it is further alleged that, "some time before the death of the decedent, the defendant knew the condition of this engine, had promised to repair it repeatedly, and had had it in the shop for that purpose," but, "notwithstanding this, they sent it out to be used for yard purposes, when the character of the work made it essential that the engine should start and stop properly;" that the decedent was killed on the very night of the day that the engine came from the shop, and he had no chance to know its defective condition; and, under these circumstances, it is insisted that the decedent was relieved from any assumption of risk. She charges that "the escaping steam and the action of the engineer in moving the engine while the deceased was endangered," as described, "were the real and proximate cause of his death." She charges that "the valves of said engine around the piston rods, and also the steam chest and cylinders, were leaking

badly," that by proper examination and repairs this defective condition of the engine could have been discovered and repaired, and that the defendant was negligent in failing to make a proper inspection and in failing to correct these defects; and she further charges that it was negligence to operate the engine in such defective condition, and, under these circumstances, it is insisted that the decedent was relieved of any assumption of risk.

These are substantially the allegations of negligence, and they may be divided into two grounds: (1) the negligence of the railway company in failing to inspect and repair the defects in the engine, and in knowingly using the engine in this defective condition; and, (2) the negligence of the engineer in continuing to move forward his engine after he had received the switchman's signal to move forward, when he discovered that the escaping steam had so enveloped the switchman as to make it impossible to observe his location on the track in front of the moving engine.

1. In support of the first allegation of negligence, the evidence is not controverted that the engine was in a defective condition as described; nor is it denied that the defendant company knew of this condition, or by proper inspection could have found it out; and an inference of negligence was reasonably deducible from the facts in evidence. We think, however, as to this the deceased switchman had assumed the risk. The evidence is clear that his opportunity for discovering the defective condition of the engine was as good as that of the master, that he had been working as a front switchman on this engine in the yards of the company from 6 o'clock in the morning until the time when he was killed, and the evidence shows that this engine had been leaking badly during this whole day, up to the very time of the accident, and that everybody connected with this engine and its operation could not possibly have failed to see the escaping steam and have knowledge of the defective character of the engine. The deceased switchman therefore knew, or in the exercise of ordinary care in connection with the discharge of his duties as a switchman could have known, that the engine had not been fixed, although it had been in the shop for that purpose, that it was defective, that the steam did escape whenever the engine started, that he fully realized his danger in connection with the escaping steam, and that, notwithstanding this knowledge, he continued his work. We think it clear, therefore, that

he assumed the risk resulting from the defective condition of the engine, and that as to this ground of negligence he was not entitled to recover.

Illustrating the second allegation of negligence, the evidence shows, or it is reasonably deducible therefrom, that the switchman, in the proper discharge of his duty and for the proper signaling for the engineer to start forward, crossed the track a few feet in front of the engine, "to the engineer's side, and gave the signal for the engineer to start forward;" that the manner in which this was done by the switchman was the customary and proper way to do it; that the engineer saw the signal and immediately started the engine forward; that the steam rushed out suddenly "in a great volume," and completely enveloped the switchman, and hid him from the engineer's view; that as the steam enveloped the switchman, the light of his lantern immediately went out; that the engineer saw that the switchman was thus enveloped, and saw that he was standing on the track when he gave the signal; that he knew that it was customary for switchmen, after giving signals of this character, to get upon the moving engine; that, seeing this perilous position of the switchman, it was the engineer's duty to stop his engine until the vapor should have been dissipated, and he, the engineer, enabled to see the exact location of the switchman, and the switchman allowed without danger to himself to get upon the moving engine; that, notwithstanding these facts, he continued to move his engine towards the place where the switchman was last seen standing on the track, and the evidence is that he could have stopped his engine "in 4 or 5 feet," but that he did not stop the engine for 90 feet from where he struck and ran over the switchman.

We do not mean to say that on these issues the evidence is altogether in favor of the contention of the plaintiff, for it is insisted by learned counsel for the railway company that the only reasonable deduction from the evidence is that the switchman was not on the track in front of the engine when he gave the signal for the engineer to start, but that he had passed over the track, and was standing off the track, in front of the engine, on the ground, in a position of safety and, himself seeing the enveloping steam, and realizing that it would be unsafe for him in that condition to attempt to step on the track, he nevertheless endeavored to do so;

that instead of waiting until the steam passed away, or until the engine stopped, to get upon the engine, he, notwithstanding the dangerous situation, through his own negligence attempted to get upon the engine, and in this manner met his death, and, therefore, that his own negligence was the proximate cause of his death. Under the evidence it is not clear how the switchman was killed. It does not disclose that he attempted to get on the engine while it was moving. He may have been walking on the track in front of the engine, and his feet may have caught in the frog of the track, and he may have been thrown, and in that position may have been run over and killed. Neither is it clearly shown that he was standing on the track in front of the engine when he gave the signal, but it is fairly issuable from the evidence that he was so standing. The uncertainty as to these questions should be left to the solution of a jury. It is not so conclusive that as a matter of law it can be held that the negligence of the deceased caused his death, or that by the exercise of ordinary diligence he could have avoided the negligence of the engineer in continuing to move his engine under the circumstances. It can not be doubted that the questions whether the engineer was guilty of negligence in moving forward his engine, notwithstanding he saw the perilous situation of the decedent, and whether, if the engine was so moved forward, this was the cause of the killing, are, under the evidence and inferences fairly deducible therefrom, at least issuable, and can not certainly be determined as questions of law. On this allegation of negligence, under the evidence, our minds are in a condition of uncertainty and unrest, and we prefer to leave the question to be solved by the jury, where, if issuable at all, the law places the responsibility of solution.

2. Learned counsel for the plaintiff contends that the act of 1909 (Acts 1909, p. 160) is applicable to this case. He concedes that it could not be applicable if the question involved a right to recover, because it would be retroactive in character, as the homicide occurred in 1906; and he insists that the presumption of negligence created by this act, from certain facts, is a rule of evidence, and, as such, would apply to any cause of action arising after the passage of the act. The general rule of law which counsel states is undoubtedly correct, that the legislature has power to make rules of evidence, and presumptions are ordinarily rules of evi-

dence, applicable to causes of action which have accrued prior to the passage of the act. In this case, however, the act expressly provides that it is applicable only to causes of action arising subsequently to its passage, and the act is intended to modify the extreme hardship of the statute which prohibited an employee from recovering damages unless he himself was absolutely faultless in connection with his injury. The act does provide that in case death results from an injury to an employee, a presumption of negligence is thus raised which must be rebutted by the employer; but this presumption constitutes an integral part of the right to recover, and can not have a retroactive effect. In *Louisville & Nashville R. Co. v. Bradford*, 135 Ga. 522 (69 S. E. 870), it is expressly held that causes of action arising prior to the act of 1909, supra, are unaffected by its provisions, and that an instruction which the trial judge in that case gave to the jury, to the effect that the presumption of negligence created by the act did apply to a cause of action arising prior to its passage, was erroneous. This seems to settle the question, and really renders unnecessary an opinion by the court on this point. However, under the statute as it stood at the time of the homicide, when the plaintiff proved the negligence of the engineer, this cast the burden on the railroad company of proving the contributory negligence of the employee.

The assignments of error as to the rulings on evidence are conceded by counsel for plaintiff not to be controlling or material, and, as they may probably not occur on a second trial, it is not now necessary to decide them. We reverse the judgment awarding a nonsuit in this case, solely on the ground discussed in the second division of the opinion.

Judgment reversed.

3160. FROST & Co. v. POWELL, administrator.

- HILL, C. J. 1. Where cotton factors sued a customer for advances made on cotton consigned for sale, the customer could set off damages caused by wrongful delay in selling the cotton according to instructions.
2. On the question of diligence by the factors in selling the cotton according to instructions, the evidence was in conflict, and this issue was therefore settled by the verdict.
3. The trial judge properly instructed the jury to the effect that a factor is bound to obey the instructions of his principal as to the sale of

produce, and if he disregards the principal's orders, and injury accrues to the principal, the loss falls upon the factor. It was also proper, in this connection, to charge that if a factor made advances on produce consigned to him for sale, he would have an interest in the consignment, and would have the right to exercise his discretion as to the time of sale, and would be entitled to disregard the instructions of his principal to sell, where he had reasonable ground to apprehend loss resulting to him by obeying the instructions, either because of the insolvency of the principal or insufficiency in the value of the consignment eventually to repay the advances made on it. *Day v. Crawford*, 13 Ga. 508; *Brown v. McGraw*, 14 Pet. 494 (10 L. ed. 558).

4. What purport to be true copies of original letters should be identified as such, to authorize them to be admitted as secondary evidence, although notice to produce the originals has been duly served and answered by the party on whom the notice has been served that he is unable to produce them. In this case the letters were immaterial.
5. There was no error in admitting the testimony as to the market value of cotton at the point of shipment, and the market value of cotton of the same grade at Savannah, although the cotton had been shipped to Charleston, S. C., where it was to be sold. The evidence tended to show the market value of the cotton at the latter place.
6. No material error of law appears, and there is some evidence to support the verdict.

Judgment affirmed.

DECIDED NOVEMBER 20, 1911.

Complaint; from city court of Leesburg—Judge Long. December 12, 1911.

Charles H. Beazley, for plaintiffs.

W. G. Martin, J. R. Long, for defendant.

3106. REISMAN *v.* WESTER.

A contract for the sale of personalty, reserving title in the seller until the purchase-money has been paid, to be valid and binding as to third persons, must be recorded as required by the Civil Code (1910), §§ 3318, 3319. Otherwise, the sale is absolute as to third persons; and where the purchaser subsequently gives the property to another, the property generally becomes subject to the debts of the latter, reduced to judgment, especially where the creditor of the donee in possession had no actual notice of the existence of the conditional contract of sale, and that the property covered by that contract had not been paid for, and extended credit on the faith thereof.

DECIDED NOVEMBER 20, 1911.

Levy and claim; from Fulton superior court—Judge Bell. November 5, 1910.

Hewlett & Dennis, for plaintiff.

Shepard Bryan, W. R. Tichenor, contra.

HILL, C. J. Wester sold a piano to Taylor, under a conditional contract in writing, reserving title until the piano was fully paid for. This contract was not recorded. He was to pay for the piano by instalments. Before paying for it he gave it as a Christmas present to his wife. After the piano had been given to her, Reisman obtained a judgment against her, and the execution issued upon this judgment was levied on the piano as her property. Wester interposed a claim. The jury in the justice's court found the piano subject to the execution, and Wester, by certiorari, asked the superior court to review this finding. The superior court sustained the certiorari and entered up final judgment in favor of Wester, holding that the property was not subject to the execution; and Reisman brings error to this court.

On the trial of the claim case there was no controversy as to the facts, which are substantially set out above. Reisman testified that he had extended credit to Mrs. Taylor on the faith of her statement that the piano was her personal property. The claimant objected to this testimony, so far as it related to the statement of Mrs. Taylor that the piano belonged to her, on the ground that it was mere hearsay, and irrelevant and inadmissible; that Mrs. Taylor was not a party to the contract between Wester and her husband, and her statement was not binding upon Wester, as he was not present when it was made. The court overruled this objection, and this is assigned as error. We think the statement of Mrs. Taylor to Reisman was admissible, as showing the good faith of Reisman in extending credit to her. Under the view that we take of the merits of the case, however, it makes very little difference why Reisman extended credit to Mrs. Taylor. His judgment was good against her and was binding on her property, and the undisputed evidence is that her husband had given her this piano.

It is insisted, however, that Mrs. Taylor knew that her husband had not paid for the piano, that he bought it from Wester on instalments, and that he had no right to make a voluntary gift of it to her as against Wester's claim for the balance of the purchase-money. And this is probably the view that the superior court took of the question. The code requires that every conditional contract of sale, to be valid as against third persons, shall be in writing and recorded within 30 days from its date. Civil Code (1910). §§ 3318, 3319. The contract in this case was not recorded. It was therefore binding upon nobody except the parties thereto.

Relatively to third persons, the sale of the piano by Wester to Taylor was an absolute sale. *Steen v. Harris*, 81 Ga. 681 (8 S. E. 206). Cf. *Rhode Island Locomotive Works v. Empire Lumber Co.*, 91 Ga. 642 (17 S. E. 1012). Now, suppose that Reisman had obtained judgment against Taylor himself, and had had the execution levied on the piano, and Reisman, when extending credit to Taylor had no knowledge of the conditional contract in writing made by Wester to Taylor; can it be doubted that Reisman's execution would be prior in dignity to Wester's claim? The creditor (with judgment lien) of the donee of the purchaser under the conditional sale is likewise a third person within the meaning of the code sections cited.

Another reason why we think the property was subject to the execution in favor of Reisman: Wester failed to record his conditional contract. He put the piano into the possession of Taylor; and, according to the evidence, Taylor told him at the time of the sale that he wanted to buy the piano as a Christmas present for his wife. He thus put it into the power of Mrs. Taylor to perpetrate a fraud on Reisman, for she stated to him that the piano belonged to her, and it was on the faith of this statement that he extended the credit to her. Wester put it into the power of Taylor, the husband, through his wife, to commit a fraud upon an innocent person; and if Reisman, the innocent person, or Wester, who had put it in the power of Taylor and his wife to perpetrate the fraud, must suffer, clearly the one who made the fraud possible should suffer, and not the one who was innocent.

For these reasons, we think that the superior court erred in sustaining the certiorari and entering final judgment in favor of Wester. The certiorari should have been overruled.

Judgment reversed.

3208. WILSON v. BARNARD.

HILL, C. J. 1. The amendment to the answer, although filed after the time for answering had expired, was properly verified as required by section 5640 of the Civil Code (1910), and there was no error in allowing it. Besides, the amendment set up no defense that was not substantially made by the original answer.

2. Under the plea of non est factum to a suit on a note, the defendant may deny either the execution of the note by him altogether, or its execu-

- tion by him in its present shape; and proof of either allegation would sustain the plea, provided, in case of alteration, the change was material. Civil Code (1910), § 4295; Joyce on Defenses to Commercial Paper, § 135.
3. Where the signature to a note sued on is attacked on the ground that it is a forgery, an admittedly genuine signature of the person purporting to have signed the note is admissible for the purpose of comparison, and to aid in the determination of the issue as to the genuineness of the signature in dispute, and the jury can make a physical inspection of both the genuine signature and the one in dispute. Joyce on Defenses to Commercial Paper, §§ 96, 97, and cases in notes.
 4. In support of his plea of non est factum, it was not error to permit the defendant to introduce in evidence a blank copy of a note, which he testified was an exact copy of the one he executed, for the purpose of showing dissimilarity between that and the note sued on and alleged to be a forgery.
 5. When a plea of non est factum is filed under oath to a suit on a note, the burden is upon the plaintiff to prove the execution of the note sued on. *Paulk v. Creech*, 8 Ga. App. 738 (2), (70 S. E. 145). It was not error for the trial judge, during the course of his charge, to instruct the jury repeatedly to the foregoing effect. One time would have been sufficient, but needless repetition in a charge of a correct principle of law, applicable to the pleadings and evidence, would not be error.
 6. Where a plea of non est factum is filed to a suit on a note, the plaintiff must prove the execution of the note sued on, before the presumption of law would arise that he was a bona fide holder for value; and, after charging sections 4286 and 4288 of the Civil Code (1910), the court did not err in also charging the above qualification.
 7. The alteration of the name of the payee in a note, without the knowledge of the maker, is a material alteration, and would constitute a good defense to an action against the maker of the note. Joyce on Defenses to Commercial Paper, § 158, and cases cited; 3 Randolph on Commercial Paper, §§ 1749, 1777.
 8. This court has repeatedly ruled that in the absence of legal error, it has no jurisdiction to interfere with a verdict supported by some evidence, although the verdict was against the preponderance of the evidence. The decisions cited to the contrary, applicable to the Supreme Court, were rendered prior to the constitutional amendment restricting the jurisdiction of that court and this court to the decision of errors of law and equity, and are not now in point.
 9. Other grounds of alleged error contained in the motion for a new trial, not specifically covered by the foregoing notes, are without substantial merit.
 10. There was evidence in support of the plea of non est factum, and the verdict for the defendant was authorized, and there was no error in refusing a new trial.
- Judgment affirmed.*

DECIDED NOVEMBER 20, 1911.

Complaint; from city court of Cartersville—Judge Foute. December 2, 1910.

John F. Norris, for plaintiff. *Neel & Neel*, for defendant.

3243. *ROBERTS v. GEORGIA SOUTHERN & FLORIDA RAILWAY CO.*

- HILL, C. J. 1. A stipulation in a contract for the shipment of live stock, requiring that, as a condition precedent to any right to recover damages for loss or injury to said live stock, "written notice of a claim therefor shall be given before said live stock is removed or intermingled with other live stock," is reasonable and valid. *Southern Ry. Co. v. Tollerson*, 129 Ga. 647 (59 S. E. 799).
2. This stipulation in the contract may be expressly or impliedly waived by the carrier. *Carter v. Southern Ry. Co.*, 3 Ga. App. 40 (59 S. E. 209); *Arnold v. Louisville & Nashville R. Co.*, 4 Ga. App. 520 (61 S. E. 1050); *Hill v. Western Union Telegraph Co.*, 85 Ga. 430 (11 S. E. 874, 21 Am. St. Rep. 166). In this case there is no evidence of waiver; but, on the contrary, the stipulation is expressly set up and relied upon by the carrier in answer to the claim made in violation of its terms.
3. Whether the stipulation above set out applies only to injuries that are patent it is not necessary to rule, for the injury in this case was not latent, but an indication of the injury was discernible to the eye by superficial examination, and was in fact discovered by the plaintiff, or his agent, before the horse was removed from the point of delivery, and no complaint was then made, or damages claimed.
4. Where the evidence shows that the plaintiff did not comply with the above stipulation in the contract, and there is no evidence of any waiver by the carrier, a recovery could not legally be had, and a verdict for the defendant was properly directed.
5. This court declines to ask the Supreme Court to review the case of *Southern Ry. Co. v. Tollerson*, supra, and other cases decided by that court to the same effect. *Judgment affirmed.*

DECIDED NOVEMBER 20, 1911.

Action for damages; from city court of Valdosta—Judge Cranford. January 27, 1911.

Patterson & Copeland, for plaintiff.

J. E. Hall, E. K. Wilcox, for defendant.

3254. *FEW v. GUNTER.*

- HILL, C. J. 1. Where a prisoner is in the common jail of the county under a warrant charging a bailable offense, and, in order to be released from imprisonment, he employs a lawyer to secure for him a bond and to represent him in the case, and the attorney does secure the bond and the prisoner is thereupon released, *held*, that a note given by the prisoner to the lawyer for his services, including the service rendered in procuring the bond, is valid and collectible, although executed on Sunday. The case is within the exception of section 416 of the Penal Code (1910), the service being in the nature of a "work of charity or necessity."

2. The evidence applicable to the foregoing principle of law demanded a verdict for the plaintiff, and the court erred in not granting a new trial. *Balter v. Smith*, 55 Ga. 245; *Weldon v. Colquitt*, 62 Ga. 449 (35 Am. Rep. 128); *Adams v. Candler*, 114 Ga. 152 (39 S. E. 893).

Judgment reversed.

DECIDED NOVEMBER 20, 1911.

Complaint; from city court of Monroe—Judge Stone. February 4, 1911.

M. C. Few, Orrin Roberts, for plaintiff.

3302. GEORGIA & FLORIDA RAILWAY *v.* JOHNSON.

HILL, C. J. 1. The plaintiff made a verbal contract with the defendant railway company to furnish it a specified number of cypress poles. It was admitted that the number of poles were furnished, but some were rejected, and payment for them was refused, because, as contended by the company, they did not come up to the specification of the contract as to size; the company contending that the contract specified that the poles were to be "10 inches in diameter at the small end." The plaintiff contended that the contract specified that they were to be "8 inches in diameter at the small end." The general manager of the defendant company, after inspecting the poles, wrote to the roadmaster, who was the agent representing the railway company in making the contract, to the effect that a majority of the poles exceeded 8 inches in diameter at the small end, and, if the specification of the contract was as claimed by the plaintiff, the company owed the account sued on. *Held*: The letter was not a confidential communication, and was competent evidence in behalf of the plaintiff. But, even if incompetent, its admission was harmless, there being no dispute that the poles were not less than 8 inches in diameter at the small end; and the letter contained no statement as to what in fact was the specification of the contract on the sole question in issue.

2. There was no error for any reason in the following instruction to the jury: "If you should find that the plaintiff has not carried the burden to your satisfaction, or that the defendant, by the preponderance of testimony, or by sufficient proof to satisfy your mind, has proven to you that they are not liable for any amount, your verdict will be: 'We, the jury, find for the defendant.'"
3. The exceptions as to alleged errors of law are manifestly without merit; the controlling question depended upon an issue of fact, on which there was conflict in evidence, and this conflict was settled by the verdict in favor of the plaintiff.

Judgment affirmed.

DECIDED NOVEMBER 20, 1911.

Complaint; from city court of Nashville—W. G. Harrison, judge pro hac vice. February 18, 1911.

William H. Barrett, J. P. Knight, Quincey & McDonald, for plaintiff in error.

Rogers & Heath, contra.

3535. LINDER *et al.* v. COLE BROTHERS LIGHTNING-ROD CO.

1. Though an executory contract of purchase and sale may not be subject to countermand, under its terms, except by mutual consent, still, so long as it is executory on both sides, notice by the purchaser to the seller that he will not take the goods amounts to a breach of the contract, and thereafter the seller can not, by attempting to deliver the goods, treat the contract as executed on his part, and sue the buyer for the full purchase-price. His remedy is an action for the damages resulting from the breach of the contract.
2. The plea, not being subject to general demurrer, was improperly stricken, and for this reason the judgment against the defendant must be reversed.

DECIDED NOVEMBER 20, 1911.

Complaint; from city court of Dublin—Judge Hawkins. March 13, 1911.

J. S. Adams, for plaintiffs in error.

POWELL, J. The lightning-rod company sued Linder for the purchase-price of about 200 feet of lightning-rod, which had been ordered under a written contract stating that it was not subject to countermand, except by mutual consent. The petition alleged delivery. The plea set up that, though the defendant had signed the contract, he had never accepted any of the lightning-rods from the plaintiff, and had renounced the contract, for that, within a few hours after the contract was made, and before the plaintiff had been put to any expense or trouble whatever, or had undertaken to fill the order, he had canceled it, and had told the plaintiff that he would not take the rods, and had directed the plaintiff not to ship them. He denied that delivery had been made. On this state of facts, the case is controlled by *Black v. Kaplan*, 9 Ga. App. 811 (72 S. E. 303); *Rounsaville v. Leonard Co.*, 127 Ga. 735 (6), (56 S. E. 1030); and *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140 (42 S. E. 378, 59 L. R. A. 122, 94 Am. St. R. 112).

Judgment reversed.

3546. **MACON, DUBLIN & SAVANNAH RAILROAD CO. v. HASTY.**

1. The evidence authorizes the verdict.
2. It was not error for the judge to charge the jury, in an action against a railroad company for killing stock, that it was within their discretion to enhance the damages by adding interest thereto at the rate of 7 per cent. per annum, but expressed merely in an aggregate sum in their verdict.

DECIDED NOVEMBER 20, 1911.

Action for damages; from Twiggs superior court—Judge Martin. June 7, 1911.

Minter Wimberly, L. D. Shannon, Akerman & Akerman, for plaintiff in error.

L. D. Moore, contra.

POWELL, J. The company killed one of the plaintiff's cows. The jury found for the plaintiff. The defendant made a motion for a new trial on the general grounds. The trial judge overruled it, and the defendant excepts.

1. The engineer and the fireman were the sole witnesses for the defendant. The engineer testified that he did not see the cow at all; that the front of the extension boiler was in the way; that the track curved to the left, and that his first information as to the cow was when the fireman told him it was on the track; that he then applied the brakes and attempted to reduce the speed of the train; that it was down grade, and that he could not stop in time to prevent hitting the cow. The fireman said that he was on the lookout on the left side of the engine, when he saw the cow about 125 yards away; that he immediately notified the engineer, and that the engineer tried to stop, but could not. The fireman was not able satisfactorily to explain why he did not see the cow sooner, except by stating that he saw it soon after they came out of the mouth of a cut. There was evidence that, notwithstanding the curve and the cut, the point where the cow was standing would have been in sight from an approaching train 200 yards, and that the cow ran down the track from that point 130 yards, making a total of 330 yards from the point where the cow could have first been seen to the point where she was finally struck. The engineer said that in his opinion he could have stopped his train, running at the speed he was and on the grade he was, in a distance of 300 or 400 yards; and if he could have brought it to a dead standstill at this distance,

it would seem that he could have slackened speed sufficiently to have prevented striking the cow, which was running at some speed ahead of the train, in a somewhat shorter distance. Hence the jury had the right to infer negligence in one or two respects—either that the fireman was not maintaining a diligent lookout, or that he did not notify the engineer promptly after seeing the cow. At any rate, there is enough conflict to warrant the verdict.

2. There was no error in the charge of the court to the effect that the jury might enhance the damages, in their discretion, by adding interest at 7 per cent. from the time of the killing to the time of the trial, expressing the aggregate amount of damages in their verdict, the total amount in no event to exceed the amount sued for. We understand this to be the law. Of course, in such cases the interest becomes a part of the damages, and it may be technically inaccurate to speak of adding the interest to the damages; but a jury would not be misled by this, nor reach a wrong conclusion on this account.

There is an exception to the failure of the court to give in charge principles of law stated in a request to charge, but upon examination we find that he did in substance give the principles stated in the request.

Judgment affirmed.

3550. **MACON, DUBLIN & SAVANNAH RAILROAD CO. v. BARFIELD.**

There was sufficient evidence in the record to prevent this court's interfering with the verdict.

DECIDED NOVEMBER 20, 1911.

Action for damages; from city court of Dublin—Judge Hawkins. May 8, 1911.

Minter Wimberly, Adams & Flynt, Akerman & Akerman, for plaintiff in error.

POWELL, J. The railroad company killed the plaintiff's mule. The jury found for the plaintiff. Defendant's motion for a new trial was overruled, and it excepts.

If the engineer's testimony is to be taken as the truth of the transaction, the company was not liable. It is argued that the jury had no right to disregard this testimony. It is conceded that other

witnesses disputed his testimony as to whether he slackened his speed at the time he said he slackened it, and as to whether he sounded the cattle alarm as he said he sounded it. It is said that there is no conflict in his testimony, so far as it states that he was so close upon the mule before he discovered it that he could not have stopped his train in time to prevent striking it, and that, in spite of the conflict as to other matters, his testimony must be believed as to this, wherein he is not contradicted, and that this alone is sufficient to rebut the presumption of negligence. One of the ways to impeach a witness is to disprove material facts testified to by him, relating to the transaction in question. The testimony of the engineer that he threw on the brakes and brought about a slackening of the speed of the train, and that he sounded the cattle alarm, related to the *res gestæ* of the transaction, and if the jury believed the contradictory testimony of the other witnesses, and, hence, found that his statements as to these things were not true, they could have considered the engineer as impeached, and disregarded his testimony.

It is said, however, that the verdict was without evidence to support it, because it is not shown that the injury complained of occurred in Laurens county. The testimony of at least one of the witnesses locates the scene of the killing of the mule at a point less than a quarter of a mile from the defendant company's station at Rockledge, as he himself, according to his testimony, was about a quarter of a mile from the station, and the place where the mule was killed was between him and the station. By the act of August 17, 1908 (Acts 1908, p. 900), we are informed that the town of Rockledge is in the county of Laurens, and that its corporate limits extend "eight hundred yards in all directions from the depot of the Macon, Dublin & Savannah Railroad Company at Rockledge." Hence every point on the company's track within a quarter of a mile of the station at Rockledge is in Laurens county. Therefore, even if the point as to the jurisdiction of the court may be made under the general grounds of the motion for a new trial, it is not well taken.

Judgment affirmed.

3555. TAYLOR v. KEEN.

1. A plaintiff can not successfully maintain an action of trover for timber cut and carried away from land, where he has not had any possession of or title to the timber, except in so far as title to the land or possession thereof may have carried with it title to the timber, and the only semblance of title he shows to the land is a deed not connected with any source of title, under which he shows only transitory acts of possession, which had ended prior to the time the timber was cut.
2. Bare possession of land, though not coupled with title, gives the possessor certain rights; but these rights end when the possession is abandoned.

DECIDED NOVEMBER 20, 1911.

Trover; from city court of Abbeville—Judge Strozier. May 9, 1911.

E. H. Williams, for plaintiff.

Haygood & Cutts, for defendant.

POWELL, J. Taylor brought trover against Keen for the recovery of 63 sticks of round timber, alleged to have been grown on lot of land 353 in the fourteenth district of Dodge county, and to have been cut therefrom unlawfully. The plaintiff attempted to show ownership of the timber, by showing title to the land or possession thereof. There was testimony that in the year 1902 or 1903 the plaintiff bought the lot of land in question from one Thomas Walker, who executed to him a deed, which had never been recorded, and which had been lost. It may be said, however, that proper secondary proof of this deed was duly made. It was a quitclaim deed, but was adequate as color of title. No title was shown in Walker; hence it possessed no greater validity than color of title. During the next year after he got this deed, the plaintiff went into possession of the land by erecting thereon a small house, which was occupied by certain employees of his, who cut timber from the lot and made staves therefrom. They remained in the house during that year from February until November. During the next year no one resided in the house and no timber was cut from the land. In the third year thereafter the laborers and stave-makers again occupied the house for a period of four months. Again in the year 1907 timber was cut from the land for the purpose of making staves, and the plaintiff's laborers occupied the house for a period of about three months. During the year 1908 the house was washed away in a freshet. The land is wild land,

and is subject to overflow from the river, and none of it can be cultivated, by reason of the fact that it is subject to overflow. Other than as above indicated, there was no house, fence, inclosure, or cultivation of any kind upon the land. The suit was brought in the year 1910, and, while the record does not definitely disclose the exact date on which the defendant cut the timber from the land, it is reasonably inferable from the pleadings that it was cut during the year 1910. It is plain that if the plaintiff's possession from the year 1902 to the year 1908, when his last vestige of possession was destroyed by the freshet, could be considered as that open, notorious, continuous occupancy which is essential to the ripening of acquisitive prescription, no title by prescription was in fact acquired thereby, for it lasted for less than the statutory period of seven years. The plaintiff had no title by prescription. His only reliance therefore was upon prior possession.

Whether we take the view that the right of a plaintiff to recover in ejectment, and in similar actions, on prior possession, rests on a presumption of title, or take what is, perhaps, the correct view, that the possession itself is property, which the law will protect, is of no consequence here. The possessor who shows no higher right than his mere possession loses that right whenever his possession ends, except in those cases where it constructively continues by reason of an *animus revertendi*. *Knight v. Isom*, 113 Ga. 613 (39 S. E. 103); *Delay v. Felton*, 133 Ga. 15 (3), (65 S. E. 122); *Watkins v. Nugen*, 118 Ga. 375 (1), 377 (45 S. E. 260); *King v. Sears*, 91 Ga. 577 (7), 589 (18 S. E. 830); *Jones v. Nunn*, 12 Ga. 469, 474. However, no *animus revertendi* can save the plaintiff's rights, where the physical evidences of the possession, such as houses, fences, etc., are totally destroyed, and no other control over the property is shown. The writer of this opinion has so lengthily discussed these questions in the twelfth chapter of his text-book on "Actions for Land" (see, especially, §§ 300, 312, where the Georgia cases are collected and cited) that he takes the liberty of making reference to it, instead of further extending the discussion of the question here. The plaintiff, having shown no title to or possession of the land at the time the alleged cause of action arose, could not maintain trover for the timber cut therefrom, since he has not otherwise shown possession of or title to the timber itself.

Judgment affirmed.

3559. WATERMAN *v.* BARCLAY *et al.*

A promissory note, in the body of which there is no recital indicating that it is to be a sealed instrument, does not, under the statute of this State, become a sealed instrument because there is placed after the maker's signature a scroll, or the letters "[L. S.]," or any device of similar import; nor because underneath the body of the note are written or printed the words, "Signed, sealed, and delivered in presence of," followed by the name of a subscribing witness.

DECIDED NOVEMBER 20, 1911.

Complaint; from city court of Jeffersonville—Judge Shannon.
April 16, 1911.

Oliver C. Hancock, for plaintiff.

L. D. Moore, for defendants.

POWELL, J. The plaintiff sued on notes. The defendant filed a demurrer, on the ground that the petition showed on its face that the action was barred. More than six years had elapsed since the notes became due, and it is conceded that, unless they are held to be instruments under seal, the demurrer is well taken. Under our statute (Civil Code (1910), § 4359), "no instrument shall be considered under seal unless so recited in the body of the instrument." It is well settled that merely to add the word "[Seal]," or the letters "[L. S.]," after the signature, does not make the instrument a sealed instrument. In this case there is no recital in the body of the note indicating any intention of creating a sealed instrument. The letters "[L. S.]" follow the signature, and on the corner opposite the signature, and below it, are the words, "Signed, sealed, and delivered in presence of," followed by the signature of an attesting officer.

The plaintiff contends that this recital in the attesting clause is a sufficient compliance with the statute, and relies on the case of *Humphries v. Nix*, 77 Ga. 98. In that case it was held that "where, at the end of a note, were the words, 'Signed and sealed,' followed by the signature of the maker and a scroll for a seal, with the letters '[L. S.]' written across it, this was equivalent to the words, 'Witness my hand and seal,' followed in the same way, and the paper was a sealed instrument." This case was considered and distinguished in *Echols v. Phillips*, 112 Ga. 700 (37 S. E. 977), it being there pointed out that in the *Humphries* case an inspection of the record showed that the words "Signed and sealed" were in the body of the note, and that there was nothing to indicate that they

were placed there for the attestation of a witness. In the case cited from 112 *Ga.* 700 (37 S. E. 977), it was held: "A promissory note, in the body of which there was no recital that it was under seal, was not a sealed instrument because there was, after the maker's signature, a scroll embracing the letters '[L. S.]'; nor because underneath the body of the note appeared the words, 'Signed, sealed, and delivered in presence of,' beneath which no name was signed, and which, from their position on the paper, were evidently designed to be signed by an attesting witness or witnesses, and not intended to constitute a portion of the contract embraced in the note."

The plaintiff tries to distinguish the case in the 112 *Ga.* 700 (37 S. E. 977), on the ground that in that case no witness had attested, while in this case there was an attesting witness. If any importance at all is to be attached to this circumstance, it only adds weight to the conclusion that the words, "Signed, sealed, and delivered," appearing in the note here sued on, were not intended to be a part of the body of the instrument, but were only intended to be a part of the attesting clause, and were in fact a part of it.

The court did not err in dismissing the suit on the ground that it was barred by the statute of limitations.

Judgment affirmed.

3586. GARNETT *v.* THE STATE.

1. A plea in abatement, setting up that a member of the grand jury who returned the indictment was also a member of the firm whose store was alleged to have been burglarized, is insufficient in law.
2. A point not insisted on in the brief of counsel for the plaintiff in error will be treated as abandoned.
3. Where, in a chain of evidence fixing unmistakable guilt on the accused, there is one link consisting of his own incriminatory admission leading to the discovery of other independent circumstantial evidence, the incriminatory admission, together with the circumstances, should go before the jury, even though it appear that the incriminatory admission was induced by promise of immunity from prosecution.
4. The corpus delicti was sufficiently proved by the circumstantial evidence, coupled with the incriminatory admissions of the accused.
5. While, from some of the numerous grounds of the motion for a new trial, complaining of the admission of evidence, there appears some hearsay and some irrelevant testimony, it also appears that the defend-

ant was not prejudiced thereby; and the trial being otherwise free from error and the evidence strongly indicative of guilt, this court would not be justified in reversing the judgment overruling the motion for a new trial.

6. The venue was sufficiently proved.

7. The charge was full and fair, and covered the written requests, in so far as they were appropriate to the issues in the case.

DECIDED NOVEMBER 20, 1911.

Indictment for burglary; from Richmond superior court—Judge H. C. Hammond. June 24, 1911.

Isaac S. Peebles Jr., for plaintiff in error.

J. S. Reynolds, solicitor-general, John M. Graham, contra.

RUSSELL, J. Garnett, who, at the time of the transaction set out below, was a policeman of the city of Augusta, was convicted of the offense of burglary, and sentenced to seven years' imprisonment. Some time in 1907 it was reported to the prosecutor, J. J. O'Connor, a member of the firm of Rice & O'Connor Shoe Company, that there was a lot of his shoes in a certain cellar. The matter was investigated by the police department of the city, and, having cause to suspect the defendant, his locker at the police barracks was examined, and therein was found a pair of ladies' shoes, which were identified by the prosecutor as shoes from his stock. The defendant was then sent for, and, in an interview which followed between him and the prosecutor, at which several other witnesses were present, he admitted that he had taken the shoes from the prosecutor's store one night, by using a key with which he effected an entrance through the front door. He further admitted that he had taken about \$250 worth of shoes from the same store, and thereupon agreed to pay \$150 in settlement of the matter, to which the prosecutor assented. Whether the money was ever paid does not clearly appear, but it is fairly inferable from the testimony that it was not. The evidence does show that about a dozen pairs of shoes were returned by the defendant to the prosecutor, and that these shoes were clearly identified as shoes sold only by the prosecutor's firm at Augusta, and of their brand, size, and mark. After the conversation in which the defendant admitted that he had effected the entrance into the store with a key, the prosecutor met him in the street and asked him for the key, and was given by him a key with which the prosecutor afterwards unlocked the door of the store. The shoes returned by the defendant were kept at

the house of a fortune-teller, with whom he was intimate. Shortly afterward the defendant fled from the State, and he remained in hiding for three years.

It appears that, at the first interview between the prosecutor and the defendant, the prosecutor promised not to hurt a hair of the defendant's head if he would tell the truth about the matter, and further promised to help him hold his position on the police force. Relying on these promises of immunity from punishment, and hope of being rewarded by retention in his position, the defendant made the admissions, and undertook, by causing the return of goods, to make satisfactory restitution and settlement of the matter. In his statement at the trial he denied all guilt, and explained his admissions previously made by saying he was trying to shield the fortune-teller, who feared trouble with the police because she had not paid her license fee. He accounted for his flight by saying that, after the matter was given publicity, he noted that public opinion was so strong against him that, under the advice of his attorney, he fled from the State until sufficient time had elapsed to insure his having a fair trial, when he voluntarily returned and surrendered.

1. Before pleading to the merits, the defendant filed a plea in abatement, on two grounds, the first of which was that it appeared that J. J. O'Connor, a member of the firm whose store was alleged to have been burglarized, was a member of the grand jury by whom the presentment was found. There was a day when parties litigant were wholly incompetent as witnesses; the reason of the law at that time being that their interest in the result of the case was such as to make their testimony of no probative value. It is a far cry from that day to this, when usually the only, and certainly the most important, witnesses in every case are the parties litigant themselves, whose testimony is admitted to the jury, to have such weight as that tribunal may see fit to give it. No less interesting is the change as to the qualification of a juror as a witness. There was once a time in our law when, after retiring to the jury-room, jurors could administer the oath to one another, hear their own evidence as to the transaction in issue, and bring in a verdict on the evidence thus adduced, out of the hearing of judge, lawyers, and parties litigant. In this day and time the verdict must be based on the evidence as heard from the witness-stand, and a juror is

expressly forbidden to act on his own private knowledge of the transaction, unless he is sworn and examined as a witness in the case. Civil Code (1910), § 5932. Thus do our notions of things change. But we have not yet reached the point that we are willing for a juror to act as a judge in his own case, and still recognize that a party and his relatives are not qualified to sit in the petit-jury box. The person from whom goods are alleged to have been burglarized sustains such a relation to the State's side of a criminal case that he would be incompetent as a petit juror. But the grand jury is merely a court of inquiry, and the disqualification of a grand juror for such a cause can not be taken advantage of by plea in abatement. The reasons for this rule are well stated in the recent case of *Hall v. State*, 7 Ga. App. 115 (66 S. E. 390). We conclude, therefore, that the judge did not err in holding that the plea in abatement was insufficient in law in this particular.

2. The second point raised by the plea in abatement relates to whether or not the indictment was indorsed by the grand jury as the law requires. The brief of the plaintiff in error makes no reference to this point, and we assume, therefore, that it has been abandoned. *Groves v. State*, 8 Ga. App. 690 (3), (70 S. E. 93).

3. The motion for a new trial, as amended, contains 39 grounds, all of them presenting, in a little different way for the most part, the same general questions. The first one we shall discuss is whether or not the court erred in admitting the alleged incriminatory admissions of the defendant. It is ably and earnestly argued before us that it appears from the State's own evidence that the admissions were not freely and voluntarily made, but were induced by hope of reward, based on promises of the persons receiving the admissions. We are inclined to believe that able counsel fails clearly to delimit the difference between a confession and an incriminatory admission. A confession not freely and voluntarily made should be rejected. The reason for this rule has been stated so many times and is so well known that restatement here would be useless redundancy. On the other hand, where the reason fails, the rule ceases. Where, in the chain of evidence fixing unmistakable guilt on the accused, there is one link, consisting of his own admission, which makes the chain complete, the law in its wisdom does not reject that link as useless, but permits it to go before the jury, not as a confession, but merely as a circumstance,

which, together with the other evidence in the case, tends to prove the guilt of the accused. *Daniels v. State*, 78 Ga. 99 (3), 103. 104 (6 Am. St. Rep. 238).

Where, therefore, in making a confession which comes up to the full requirements of the law in all particulars, save that it was not full, free, and voluntary, the defendant discloses a clue which leads to other extraneous evidence tending to incriminate him, the evidence thus disclosed, together with the particular part of the admissions of the defendant relating thereto, is admissible. This was just what happened in the case at bar. It is true that, before making the alleged confession, the defendant, a policeman, thought he had securely intrenched himself behind promises which would forever keep closed the mouths of the persons in whose presence he was speaking. It is often said, however, that a little learning is a dangerous thing, and the truth of the maxim is well illustrated in the case at bar. The experience of a policeman is such that he must soon become acquainted with the general principle that a confession not voluntarily made can not be used against the confessor. Few of them, however, would have occasion to know the limitation on this principle to which allusion has been made. If the defendant had been content to remain intrenched behind the general principle, he would have been safe; but he went further, and disclosed clues which resulted in the unearthing of extraneous evidence which weaved about him a web so strong that even the most incredulous of all the doubting Thomases would not call for confirmation. There are the ladies' shoes in his locker at the police barracks, positively identified as having come from the stock alleged to have been burglarized; there is the key, found in his possession, with which he says he opened the door and which proved to fit it; there are the lot of shoes of the same kind, with the private mark and identified as sold at Augusta only by this firm, which never in the memory of the senior member had sold so large a quantity at retail to one person; there is the fortune-teller, with whom the defendant was intimate, and at whose house he directed the negro hackman to call for the shoes and return them to the firm, from whom he says he had taken them; there is the defendant's flight from the State—all these circumstances tending to show his guilt, and his own statements fitting in so well with the other indicia of guilt. The judge properly, therefore, received in evidence these

incriminatory admissions, and correctly charged the jury as to the rules of law governing such evidence. *Rusher v. State*, 94 Ga. 365 (21 S. E. 593, 47 Am. St. Rep. 175); *Pines v. State*, 21 Ga. 227 (3); *Dixon v. State*, 116 Ga. 186 (3), (42 S. E. 357); *Waycaster v. State*, 136 Ga. 95 (70 S. E. 885).

4. The next point urged is that the corpus delicti was not sufficiently proved. It appears that the shoes were not missed from the stock at the time of the alleged burglary, and that the only evidence that a crime had been committed was that adduced after suspicion had pointed to the defendant and the investigation resulted in the disclosure of the clues which led to his admission, which in turn unearthed other circumstances of guilt. We are aware of the rule that a confession uncorroborated is not sufficient proof of the corpus delicti; but we are also cognizant of the counter proposition that the corpus delicti, may be proved by circumstantial evidence; coupled with an incriminatory admission of the defendant. The jury were authorized to infer from the evidence, direct and circumstantial, that the store had been burglarized and that the defendant was the burglar; and, after all, this is what corpus delicti means.

5-7. Various other grounds of the amended motion complain that the court erred in admitting certain testimony over the defendant's objection that it was hearsay or irrelevant. A careful examination of each ground, together with the record as a whole, fails to disclose any error so prejudicial to the defendant as to justify a new trial. We are inclined to believe that some of the evidence which was admitted possessed such a slight degree of relevancy, if relevant as all, that it might properly have been rejected; and that in one or two instances the judge allowed a little hearsay evidence of slight relevancy to creep in; but in a case so free from other material error, and one wherein the proof is so strongly indicative of guilt, the admission of harmless irrelevant or hearsay testimony is not cause for a new trial. The venue was properly proved. The requests to charge, so far as pertinent and appropriate, were covered by the general charge.

Judgment affirmed.

3639. KILLENS *v.* THE STATE.

RUSSELL, J. No material error of law is complained of, and the evidence is sufficient to support the verdict. *Judgment affirmed.*

DECIDED NOVEMBER 20, 1911.

Accusation of larceny; from city court of Miller county—Judge Bush. July 28, 1911.

Bush & Stapleton, for plaintiff in error.

P. D. Rich, solicitor, contra.

3655. HARWELL *v.* THE STATE.

A person who, by loud talking and laughing, disturbs a "sleight-of-hand performance" conducted by a traveling performer at a school-house, under an arrangement with the trustees whereby the performer is to pay the trustees 10 per cent. of the door receipts for the use of the school-house, is not guilty of violating section 424 of the Penal Code (1910). Such a meeting is not a "public school, private school, or Sunday-school, or any assemblage or meeting of any such school," within the meaning of the words of that statute.

DECIDED NOVEMBER 20, 1911..

Accusation of disturbing school; from city court of Carrollton—Judge Beall. August 4, 1911.

J. O. Newell, for plaintiff in error.

C. E. Roop, solicitor, contra.

RUSSELL, J. The language of the statute is: "Any person who shall willfully interrupt or disturb any public school, private school, or Sunday-school, or any assemblage or meeting of any such school, lawfully and peacefully held for the purpose of scientific, literary, social, or religious improvement, either within or without the place where such school is usually held, shall be guilty of a misdemeanor." The proof is that a sleight-of-hand performer, desiring to give a show in the community, obtained the use of the school-house by agreeing to give the trustees 10 per cent. of the door receipts for the use of the room, and that, while he was giving his performance, the accused disturbed it. The statute is directed against the disturbance of schools and assemblages of persons at school-houses for some purpose connected with exercises pertaining to a school, and has no reference to meetings of any other nature, though held in the house where school is commonly

conducted. The language of the statute is not very clear in all of its terms, but by no fair construction can it be made to include a case like this.

Judgment reversed.

3663. YOUNG v. THE STATE.

Where a baseball player and an umpire become involved in a quarrel over a point in the game, and while the umpire is advancing toward the player with his hand in his pocket the player pulls a pistol and kills the umpire, a verdict finding the player guilty of voluntary manslaughter is not contrary to law, nor without evidence to support it.

DECIDED NOVEMBER 20, 1911.

Indictment for murder; from Screven superior court—Judge Rawlings. July 11, 1911.

E. K. Overstreet, for plaintiff in error.

Alfred Herrington, solicitor-general, Hines & Jordan, contra.

RUSSELL, J. The defendant, Son Young, was a member of a baseball team who were playing a game down on Briar creek one Saturday afternoon. The deceased, Son Williams, was umpiring the game, and also doing the tallying. The defendant claimed that the opposing team had made only three runs, whereas the deceased had given them five runs; whereupon an argument began, and then cursing followed. Finally the deceased started toward the defendant with his hand in his pocket, and the defendant pulled his pistol and shot him. He was indicted for murder, convicted of voluntary manslaughter, and sentenced to five years' imprisonment.

The motion for a new trial contains only the general grounds. We are of the opinion that the evidence authorizes the verdict. *Spence v. State*, 7 Ga. App. 825 (68 S. E. 443); *Fallon v. State*, 5 Ga. App. 659 (63 S. E. 806); *Malone v. State*, 49 Ga. 217.

Judgment affirmed.

3694. GIBSON v. THE STATE.

RUSSELL, J. Under the evidence, the defendant was guilty of assault with intent to rape, or not guilty at all, and therefore there was no error in not charging the law as to assault and battery. An assault with intent to induce consent to sexual intercourse on the part of a female child under the age of consent is not assault and battery, but assault with intent to rape, just as the completed intercourse with such a child would be rape.

Judgment affirmed.

DECIDED NOVEMBER 20, 1911.

Indictment for assault with intent to rape; from Floyd superior court—Judge Maddox. August 19, 1911.

Eubanks & Mebane, for plaintiff in error.

John W. Bale, solicitor-general, contra.

3703. FULLER v. THE STATE.

This case is controlled by *Mulkey v. State*, 1 Ga. App. 521 (57 S. E. 1022).

DECIDED NOVEMBER 20, 1911.

Accusation of cheating and swindling; from city court of Americus—Judge Hixon. August 5, 1911.

Hollis Fort, for plaintiff in error.

Zach Childers, solicitor, contra.

RUSSELL, J. The defendant was convicted of violating the "labor-contract act" of 1903 (Penal Code of 1910, §§ 715, 716). The court charged the jury, in effect, that if it was satisfactorily proved that the accused made the contract, and procured money or other thing of value thereon, and failed to perform the service contracted for, or to make restitution, without good and sufficient cause, the burden of proof would then be shifted to the defendant to prove his innocence. This charge is contrary to the decision in *Mulkey v. State*, 1 Ga. App. 521 (57 S. E. 1022). This statute (§ 716) does say that the acts therein enumerated "shall be deemed presumptive evidence of the intent referred to." Evidence may be presumptive evidence, without being sufficient to establish a fact beyond a reasonable doubt. We held, in the *Mulkey* case, supra, that this statute does not give to the enumerated acts any greater probative value than they previously had; that it merely authorized these facts to be admitted in evidence, to be weighed by the jury as circumstances from which they might or might not infer the guilt

of the accused; that the presumption of innocence was still in the defendant's favor, and that the burden was still on the State to prove its case beyond a reasonable doubt; and that one of the elements still to be proved with this degree of certainty is the intent to defraud.

Counsel for the accused does not properly raise any question as to the constitutionality of this portion of the act, and therefore we are not called upon to pass thereon, otherwise than to recognize the same rule we have always recognized, to wit, that it is the duty of the court to give this statute that construction which will not render it repugnant to either the State or the Federal constitution. We held in the *Mulkey* case (uniformly adhered to since) that the trial is not legally conducted if the judge gives the foregoing provision in charge, unless he also informs the jury as to the attendant limitations referred to above.

Judgment reversed.

3742. *HEARD v. THE STATE.*

POWELL, J. The evidence, though slight as to one of the material elements of the case, is not legally insufficient to support the verdict.

Judgment affirmed.

DECIDED NOVEMBER 20, 1911.

Accusation of cheating and swindling; from city court of Dawson—Judge M. C. Edwards. September 2, 1911.

M. J. Yeomans, for plaintiff in error.

W. H. Gurr, solicitor, contra.

3743. *HERNDON v. THE STATE.*

HILL, C. J. No error of law appears, and the evidence supports the verdict.

Judgment affirmed.

DECIDED NOVEMBER 20, 1911.

Accusation of misdemeanor; from city court of Macon—Judge Hodges. August 19, 1911.

The accusation charged Lewis Herndon with selling alcoholic, spirituous, malt, and intoxicating liquors, and with keeping such liquors on hand at his place of business. There was a general ver-

dict of guilty. His motion for a new trial contains, besides the general grounds, the following assignments of error: (1) The verdict is contrary to law and the evidence, in that the uncontradicted testimony of an unimpeached witness, to wit, W. P. Dumas, affirmatively showed that the alleged liquor which formed the basis for the prosecution was not found at the defendant's place of business; that the place where it was found was not a part of the defendant's place of business; that the defendant had no control over the said place; that the room or passage where the whisky was discovered was in a portion of the building rented to and in the control of third parties, not connected in any way with the defendant or his business. (2) Because the officer who made the arrest was allowed to testify as follows: "After I had placed the defendant under arrest, and had reached the door leading into the room where I found the whisky, I told the defendant to get the key to this door, and had him unlock and open the door of the room. When he opened the door I saw the whisky at the foot of the staircase. It was at my direction that defendant got the key, and at my direction that he unlocked and opened the door to the apartment where I found the whisky." The introduction of this testimony was objected to, because the officer compelled the accused to furnish the incriminating evidence against himself, in violation of the constitution and laws of this State, which provide that no person shall be compelled to give testimony tending in any manner to incriminate himself; and it was acquired while the defendant was under arrest, and without his consent, and against his will. The court overruled the motion for a new trial, and the defendant excepted.

The evidence, substantially stated, is as follows: The deputy sheriff of Bibb county testified, that the accused ran a "soft drink" place and pool-room on Cotton avenue, near New street, in the city of Macon, Bibb county; that in company with another officer he went to this place on March 26, 1911, and there arrested the defendant. The front door of the "soft drink" establishment and pool-room opened on Cotton avenue. The front room was used by the defendant as his "soft drink" place, where he kept soda water, cigars, etc. Just behind this room was the defendant's pool-room, separated by a wall, with a door between. In the rear of the pool-room, at the left-hand corner, "is a little room or passage cut off

by a wall running from ceiling to floor. It is very small, and there is a door leading into it from the pool-room. This door was open on the night of the arrest. Passing into this door, and going directly forward about three or four feet across this little room or passage, you come to another wall, leading from ceiling to floor, which has a door, and this door opens from the little room just mentioned into a room or passage, from which a stairway leads to the second story of the building. This door was locked, and the defendant, at my instance, got the key and unlocked it. The door which I found open, leading out of the pool-room, was only three or four feet from the door of the room or passage in which the whisky was found, and which was locked, and to which the defendant furnished the key, and all was under one and the same roof with the 'soft drink' place of the defendant and his pool-room. In this last-named room or passage, just at the foot of the stairway, I found an ordinary five-cent basket containing several flasks of whisky. There were six half pints of rye and one half pint of corn whisky in the basket. I asked the defendant for the key to the door at the top of the staircase, which was also locked, and he said that he did not have it; that some members of the bricklayers' union had it. When I found the whisky I said to the defendant, 'I have found your liquor;' and he said, 'Yes, sir; you've got me.' That is all I remember that was said. The stairway, which leads to the upstairs of this building had the appearance of not being in use, as there was considerable trash on it, and the door opening on the rear porch and in front of the stairway just mentioned was closed at the time the whisky was found. There is another stairway, which leads to the upstairs of this building from the front and on the outside of this building. I went to the defendant's place of business with a warrant for him and for the purpose of searching for whisky. This was the only whisky or intoxicant found on this occasion on the place. We made a thorough search of defendant's entire place. The building occupied by him is a two-story brick building, and his place of business is in the lower story. After passing from the pool-room, I had to go through two doors before I reached the room containing the basket with the whisky in it." The State introduced in evidence a diagram of the part of the building occupied by the defendant, showing the exact location of the room, and place in which the whisky was found, and also intro-

duced a five-cent basket containing six half pints of rye whisky, most of which was dreggy, and a half pint of corn whisky, which had been opened and which had in it a house-fly.

The following evidence was introduced in behalf of the defendant: W. P. Dumas testified, that he was the owner of the building in which the defendant's place of business was located, and had rented the lower floor to him, and that the defendant ran a "soft drink" place in front and a pool-room in the rear; that he rented the upstairs of the building to a colored bricklayers' union; that there were two stairways leading to the quarters above, the front stairway being on the outside of the building, and the rear stairway inside, and the bricklayers' union rented and controlled both stairways, as well as the passage down into which the stairway lands, and that this passage was not a part of the building which was rented to the defendant, and that he had no control over it and no right to use it; that the place where the whisky in question was found was not in any room, but in the little passageway or hall leading to the staircase in the rear of the building, and was separated from the part rented to the defendant by a wall reaching from the ceiling to the floor; that the members of the bricklayers' union often left the key to their quarters in the store of the defendant for their own convenience, and they often left it in the store of the witness, just a few doors below.

The defendant, in his statement to the jury, said, that he ran this "soft drink" place and pool-room on Cotton avenue; that he had never sold any whisky, beer, or intoxicants of any kind at this place of business, and had never kept any on hand; that on the night of his arrest the officers came into his place of business and told him that they wanted to search the place, and proceeded to do so; that they exhibited no warrant of any kind, and did not tell him that they had one; that they searched his "soft drink" place, in the front room, but found no whisky; that they went through the door leading back into the pool-room, searched it, and found none. They then came to the door in the wall which runs from the ceiling to the floor and separates his place of business from that part of the building rented to the colored bricklayers' union. This door was locked, and, at the command of the officer, he went and got the key and opened the door. The union rented the entire upstairs of the

building, including this stairway in the rear, and the little passage or apartment where the stairway lands, the place where the officer found the whisky. He stated that he had no control over the upstairs of the building, the stairway leading thereto, or the little passageway or apartment at the foot of the staircase, where the whisky was found; that these places had no connection with his place of business, which was separated from them by a wall reaching from the ceiling to the floor; that, his store being just under the union men's quarters, the key to the door leading upstairs was often left in his store for the convenience of the men of the union, who were frequently going to their quarters. He further stated that on the night of the arrest he had gotten the whisky for his own use and was going to carry it home and strain it, as it was full of trash and dregs, and one bottle had a fly in it; that in the condition in which it was found it was not fit for use; that, knowing that it was a violation of law to keep or put whisky in one's place of business, he got the key, unlocked the door leading into this passage where the stairway comes down, placed the basket with the whisky in it there, and relocked the door, intending, when he started home later, to unlock the stairs, get the basket, and carry it home with him; that it had been sitting there only a short time before the officers came in, it being only a few minutes before closing time; that he set the basket in the passageway because it had no connection with his place of business, as he knew that by setting it there he would not violate the law; that it was not his custom to use this passage or stairway for any purpose; and that he set the basket there on the night of his arrest only to avoid putting it in his store.

W. D. Nottingham, W. A. McClellan, for plaintiff in error.

Walter J. Grace, solicitor-general, contra.

3748. WILCOX v. THE STATE.

- RUSSELL, J. 1. There was no error in overruling the motion to quash the accusation. *Strickland v. State*, 137 Ga. 1 (72 S. E. 260).
2. The other assignments of error are not properly presented for consideration by this court. *Judgment affirmed.*

DECIDED NOVEMBER 20, 1911.

Accusation of carrying pistol without license; from city court of Ocilla—Judge Oxford. August 22, 1911.

Philip Newbern, R. M. Bryson, for plaintiff in error.

H. J. Quincey, *solicitor*, contra.

3754. CASSIDY v. THE STATE.

1. The evidence authorizes the conviction.
2. It is a violation of the statute of this State for a person to keep intoxicating liquors on hand at his place of business, "whether the package, bottle, or barrel is open or unopened."
3. The written request to charge on the subject of mere transient possession of liquors at one's place of business was properly refused, because there was no evidence on which to base it.
4. In a prosecution for keeping intoxicating liquor on hand at one's place of business, the State may show, and the jury may consider, the fact, that the accused has registered as a retail liquor dealer and paid the United States government tax therefor, even though the act approved August 21, 1911 (Acts 1911, p. 180), is not applicable, and though a prima facie case of guilt is not made out by the introduction of this evidence.
5. One who has paid the tax and obtained a license under what is known as the "near-beer act" (Acts 1908, p. 1112) is not entitled thereby to keep on hand at his place of business any alcoholic, spirituous, malt, or intoxicating liquors. The only liquors he is authorized to keep on hand are such as, if drunk to excess, will not produce intoxication.

DECIDED NOVEMBER 20, 1911.

Accusation of misdemeanor; from city court of Macon—Judge Hodges. August 19, 1911.

John P. Ross, for plaintiff in error.

Walter J. Grace, *solicitor-general*, contra.

POWELL, J. The defendant was indicted on two counts. The first charged the sale of intoxicating liquor, and the second the keeping on hand of intoxicating liquor at his place of business. He was found guilty upon the second count only.

1. The State showed that there had come by railway, addressed to the accused, a number of shipments marked "whisky," and so designated on the bills of lading; that these articles thus marked and consigned had been delivered to draymen, under written orders of the accused; and that the draymen had taken these packages and had delivered them within the place of business of the

accused. The accused's place of business was raided some time later, but no liquor was found therein. It was shown by a certified copy from the records of the office of the collector of internal revenue for the district of Georgia that the accused had registered and paid the Federal tax as a retail liquor dealer for the first half of the year 1911; the place where the business was being carried on being designated as 601 Fourth street, Macon, Ga. This was the address to which the liquor mentioned in the bills of lading was consigned. Apart from these writings, it does not affirmatively appear that the defendant's place of business was at 601 Fourth street, in Macon. The oral evidence speaks of his place of business as being at the corner of Fourth and Plum streets, in Macon, and this latter address is given as the address at which the draymen delivered the barrels and packages said to contain liquor. The accused made no statement and introduced no evidence.

We think that the evidence is amply sufficient to support the conviction. It is said that it has not been proved that the packages which were delivered to the place of business of the accused from the railway station were in fact intoxicating liquors. This is sufficiently proved by the fact that these packages were marked "whisky," that they were entered upon the freight bills, bills of lading, and receipts to the railway company as whisky, and that the accused himself recognized the contents of the packages as such, by making memoranda upon the freight bills thus describing them, requesting the freight agent to deliver them to the draymen for him. To state it more plainly, the State introduced in evidence freight bills which on their faces purported to be for shipments of whisky, together with the defendant's written order thereon to the agent, asking him to deliver the above to a named drayman, to whom the packages were in fact delivered, and by whom they were carried to the defendant's place of business. We are under the impression that there is an interstate-commerce regulation (and these were interstate shipments) requiring the contents of packages containing alcoholic liquors to be truly marked. If so, the very fact that the packages were marked as containing whisky has even higher value as circumstantial evidence than it otherwise would have. This court has, however, fully recognized the principle that proof that an article was treated by the accused himself as whisky is at least *prima facie* sufficient to prove that the article was

whisky; as where a purchaser calls for whisky, and the accused, as seller, delivers it.

We shall presently discuss the evidentiary value of the fact that the accused had registered with the internal-revenue collector of the United States government as a retail liquor dealer. We need not enter upon that now. As it was proved that these packages, thus presumptively containing intoxicating liquors, were delivered with the defendant's consent into his place of business, it was sufficiently shown that he kept them on hand at his place of business, in the absence of any proof to the effect that they were merely deposited there for the moment and immediately removed elsewhere. It may be that there is some difference between the meaning of the words "keep on hand," as used in this statute, and such an expression as "have in one's possession" (see dissenting opinion of Russell, J., in *Cohen v. State*, 7 Ga. App. 5 (65 S. E. 1096)); but the majority of this court does not think that the keeping on hand must be continuous, in order to make it violative of the statute. Merely to allow liquors to be deposited in one's place of business, under peculiar circumstances, followed by an immediate removal of them, might not constitute a violation of the statute; but where it is shown that the liquors were delivered into the place of business with the proprietor's consent, and nothing further is shown as to the disposition of them, it is to be presumed, until the contrary appears, that he is keeping them on hand, contrary to the statute.

2. By exception to the refusal of a written request to charge, the plaintiff in error makes the point that to keep unopened packages of liquor at one's place of business is not a violation of the law. The statute makes no exception of this kind, and we know of no good reason for making any such judicial exception. Indeed, deference to the spirit of the act would prevent the making of any such exception by construction or interpretation.

3. The plaintiff in error has excepted also to the failure of the court to give in charge a number of requests to the effect that, if the jury should find that there was a mere temporary deposit of intoxicating liquors at the defendant's place of business, the law would not be violated. These requests were properly refused, for lack of evidence to support them. As we have already said above,

the State, by showing delivery of the liquor into the accused's place of business, with his consent, made out the case against him; and he in no wise attempted to avoid the effect of the State's evidence by any refutation or explanation or by any attempt to show that his custody of the liquor at his place of business was merely transient.

4. The State introduced in evidence a certified abstract from the records of the collector of internal revenue of the district of Georgia, and showed that the receipt for the tax due to the government had been issued to the accused for the first six months of the year 1911, for the business of retail liquor dealer, to be carried on at 601 Fourth street, Macon, Ga. At the time this evidence was offered, the defendant objected to it, on the ground that it was not a copy of a paper required by law to be kept in the office of any particular officer; also because it was immaterial, since the State had abandoned the prosecution on the count charging a sale. The first of these objections is answered by the decision of this court in *Huckabee v. State*, 7 Ga. App. 677 (67 S. E. 837). As to the second objection: We think that it is relevant, in a prosecution for keeping intoxicating liquors on hand at one's place of business, to show that the accused has paid the government tax as a retail dealer; for it is a matter of legal knowledge that this tax is paid upon an application reciting that the person paying it intends to engage in that business. One who makes preparation and pays out money for the purpose of engaging in the business of a retail liquor dealer is much more liable to have intoxicating liquors on hand at his place of business than one who has not. It is not necessary, in a prosecution for keeping intoxicating liquors on hand at one's place of business, to show that any of the liquor has been sold; but when liquor has in fact been sold at one's place of business, this is conclusive evidence of the crime. The two acts of preparation—the getting of the liquor and the taking out of the government license—are natural concomitants, and the one has relevancy as supporting the probative value of the other.

We have not overlooked the act of August 21, 1911 (Acts 1911, p. 180), which makes it prima facie evidence of guilt in certain cases for any person to be in possession of, to make application for, or to have issued to him the United States special-tax receipt as a retail liquor dealer. This act, by its terms, is applicable to the

trial of cases brought to abate or enjoin the operation of "blind tigers," and to prosecutions for the illegal sale of intoxicating liquor. In those cases proof of the defendant's having paid the government tax as a liquor dealer is made prima facie evidence of guilt. The act is without direct applicability where mere keeping on hand is charged; but, independently of this statute, the fact of the defendant's having applied for and having paid for the special-tax receipt is relevant. The case of *Huckabee*, supra, was decided prior to the passage of this act, and therefore shows that, irrespective of the statute, proof of this nature may be received.

The point is made that this tax receipt specifies the place at which the retail liquor dealer's business is to be carried on as "601 Fourth street, Macon, Ga.," while the proof shows that the place where the liquor was delivered was the corner of Plum and Fourth streets, and, therefore, that the connection between the two is not sufficiently shown. The jury probably inferred that the two addresses were identical, from the fact that the address given on the bills of lading on which the liquors were shipped and under which the defendant received them designated the place where they were to be delivered as 601 Fourth street, and that the draymen, under this direction, delivered them at the corner of Plum and Fourth streets. But, even if this is not so, the evidence as to the payment of the government tax would not be wholly without relevancy; for, say that the two addresses are different, but in the same general locality, the jury might believe that the accused, intending to open his place for illegal sale at the address stated in the tax receipt, had stored his general stock near by in his other place of business.

5. The defendant, by numerous requests to charge, attempted to get the benefit of some such theory as that if the accused had taken out, under the act of 1908, license as a "near beer" dealer—that is, a license to sell imitations and substitutes for beer, wine, whisky, or other spirituous or malt liquors—his liability to prosecution, and the effect of the evidence against him, would be legally different from what it would be if he had not procured this license. One of the instructions requested, on this line, was as follows: "If at the time of the passage of the act of September 5, 1908, known as the 'near beer act,' there was not, and is not now, any beverage or drink or liquor, known to science or practical use in this State, in

imitation of or intended as a substitute for beer, whisky, or other alcoholic, spirituous, or malt liquors, that did not contain alcohol, then and in such event said act authorized the license and the sale of beverages or drinks of liquors containing alcohol; and proof that the beverage or liquor kept on hand or sold by the defendant contained alcohol would not, of itself and without more, authorize the conviction of the defendant." The act taxing "near beer" and other imitations of liquors (Acts 1908, p. 1112) expressly provides that "nothing in this act contained shall ever be held, taken, or construed to authorize the sale of any beverage, drink or liquor now prohibited by law." And the law then prohibited, and now prohibits, throughout the State, the sale of any and all kinds of liquors of such a nature as will, if drunk to excess, produce intoxication. "Near beer," the thing at which the act in question was particularly aimed, has been defined by this court as follows: "'Near beer' is a term of common currency, used to designate all that class of malt liquors which contain so little alcohol that they will not produce intoxication, though drunk to excess." *Campbell v. Thomasville*, 6 Ga. App. 212 (64 S. E. 815). The evidence in the present case related only to whisky as such, and there is not the slightest suggestion in the record of any other form of liquor or imitation of liquor; and whisky, of course, is judicially known to be intoxicating; so that in no event did the judge err in not giving the charges requested.

The whole record shows a clear case of guilt, followed by a legal trial and a conviction; hence the judgment is *Affirmed*.

3758. GLENN *v.* THE STATE.

1. The act approved August 12, 1910 (Acts 1910, p. 134), prohibits any applicant under the age of 18 years from obtaining a license to have a pistol or revolver about his person; and, as the terms of the act make it unlawful for any person to have a pistol or revolver about the person, except as stated, it follows by necessary implication that a minor under 18 years of age can not legally have a pistol or revolver about the person, either with or without license.
2. This State, in the exercise of its police power, has adopted the policy (as indicated by many statutes) of protecting minors from the formation of vicious habits or evil conduct; and this policy is not only within

its police power, but is a wise exercise thereof. Minors are the wards of the police power of the State.

3. The verdict is supported by evidence, and no error of law appears.

DECIDED NOVEMBER 20, 1911.

Accusation of carrying pistol without license; from city court of Jackson—Judge Fletcher. October 3, 1911.

W. E. Watkins, for plaintiff in error.

C. L. Redman, solicitor, contra.

HILL, C. J. John Glenn was convicted of a violation of the act approved August 12, 1910 (Acts 1910, p. 134), which prohibits any person from having about his person a pistol or revolver without first having obtained a license from the ordinary of the county of his residence. His motion for a new trial was overruled, and he brings error. He contends that his conviction was illegal for two reasons: First, because he was under the age of 18 years, and the act in question did not apply to minors of such tender years, as, by the terms of the act, the ordinary was authorized to grant license only to applicants 18 years of age or over, and, as minors under that age were not allowed to procure a license, it was illogical and unjust to punish them for failing to do something that under the terms of the act they were not allowed to do; and it is insisted, apparently with seriousness, that minors in this State under the age of 18 years are legally allowed to carry pistols or revolvers on their persons without any license, if they do not carry them concealed. We think the conclusion is a non sequitur. Indeed, we frankly confess that it would require an express declaration of the legislature of the legislative intent, before we would be willing to place the lawmaking body of the State in the attitude of requiring adults to obtain licenses before they could have or carry pistols or revolvers about their persons, and of permitting, in the same statute, minors under the age of 18 to have this right without any restriction. On the contrary, we are convinced that it was the intention of the legislature that minors under 18 should not have this right at all, either with or without a license.

This purpose is not only manifest, but wise. It is also in harmony with the legislative policy of the State as to rights of minors. The police power of the State makes a special charge of minors. It gathers them under its ample and protective wing "even as a hen gathereth her brood." Minors, as to their property rights, are the wards of chancery. Minors, as to their protection from vicious

conduct or habits, are the wards of the police power of the State. The truth of the latter part of this statement is proved by the numerous statutes in the code restricting the exercise by adults of rights in so far as the exercise of these rights relate to minors. No person controlling a billiard table, pool table, or tenpin alley is allowed to permit a minor to play or roll on the same. Penal Code (1910), § 406. No person can furnish to a minor spirituous, intoxicating, or malt liquors without first obtaining written authority from parent or guardian. Penal Code (1910), § 444. No one is allowed, through himself or agent, or in any other way, to furnish a minor with cigarettes, cigarette tobacco, cigarette paper, or any substitute therefor. Penal Code (1910), § 491.

Illustrating the purpose of the legislature in the act now under discussion, no person can knowingly sell, or furnish, any minor with "any pistol, dirk, bowie knife, or sword cane, except under circumstances justifying their use in defending life, limb, or property." Is not this section inconsistent with that part of the act of 1910 which permits a license to be granted to a minor, even above the age of 18 years, to carry about his person a pistol or revolver? If he can not be furnished or sold a pistol by any one, he should not be permitted to have a license to carry that which he can neither legally buy nor receive as a gift. Neither can any one furnish to minors any malt liquors, whether such liquors are intoxicating or not. *Stoner v. State*, 5 Ga. App. 720 (63 S. E. 602). An adult is not permitted to gamble with a minor at any game played with cards, dice, or balls. Of course, adults can not lawfully gamble with each other; but the penal statute above noted makes it a distinct offense for an adult to gamble with a minor. Penal Code (1910), § 393. These and other statutes of similar character all prove the truth of the statement that the protection of minors is a favorite exercise by the State of its police power. We conclude, therefore, that the act of 1910 not only prohibits minors under the age of 18 years from obtaining license to have a pistol or revolver on their persons, but that the clear intendment of the act is to prevent minors from having about their persons at all this character of weapons, and this construction is in harmony with the general legislation of the State on the subject of minors.

The next ground upon which it is insisted that the conviction in

this case was illegal is that, if the act in question is construed to prohibit minors from having about the person a pistol or revolver, this construction would be in violation of article 1, section 1, paragraph 22, of the constitution of Georgia. This provision of the constitution declares that "the right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne." The Supreme Court, in the case of *Strickland v. State*, 137 Ga. 1 (72 S. E. 260), has held that the act is not violative of this provision of the State constitution. While the exact question made in this record and now under consideration was not directly involved in that case, yet we think it fairly and reasonably deducible, from some of the language which is used by Mr. Justice Lumpkin in the opinion of the majority of the court, that the construction which we place upon the act in reference to minors under the age of 18 years is the view entertained by that court. It is entirely within the province of the legislature, in the exercise of the police power of the State, to prohibit, on the part of minors, the exercise of any right, constitutional or otherwise, although in the case of adults it might only have the right to regulate and restrict such rights. There are some rights that may be exercised by adults, without harm to the State, which, if exercised by minors, might injuriously affect in some way the public health, public safety, or public morality. Unquestionably the possession of a pistol or revolver by a minor constitutes a menace to the peace of the public, and to the safety of the individuals constituting the public.

So far as the writer of this opinion is concerned, he is decidedly of the opinion that the possession of a pistol or revolver about the person, either by a minor or an adult, concealed or open, is a menace to individual safety and to law and order, and he concurs strongly in the view of those able jurists who construe the constitutional provision above quoted as not applicable to the modern pistol or revolver. The framers of the Federal constitution and of the State constitution did not have this weapon in contemplation when the provision as to the right to "bear arms" was adopted. This constitutional provision, rationally construed, applies only to such "arms" as could be used by the army or the militia in the preservation of public order. It is incredible that any lawmaking body, cognizant of the evils of having about the person a pistol or re-

volver, would have intended to preserve such an evil by a constitutional provision. The ordinary pistol or revolver, usually carried in the hip-pocket, is a weapon of offense, rather than of defense. The pistol is, in the opinion of the writer, the most offensive weapon ever devised by the ingenuity of man for the destruction of life and of the peace of society. The people in their sovereign capacity have the right to prohibit absolutely this evil, and the individual member of society can not claim it as one of the inalienable constitutional privileges of personal liberty. In a free country no man has any personal right that is not subservient to the public weal. "Salus populi suprema lex" is a rule of unlimited application, and qualifies every personal right of the citizen.

One of the ablest and wisest judges who ever presided in the Supreme Court of this State, in discussing this provision of the constitution, in the case of *Hill v. State*, 53 Ga. 472, uses the following wise and cogent language in alluding to this right claimed to exist under the constitution: "It is to secure the existence of a well-regulated militia; . . . and I have always been at a loss to follow the line of thought that extends the guaranty to the right to carry pistols, dirks, bowie-knives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day. It is in my judgment a perversion of the meaning of the word 'arms,' as used in the phrase 'the right to keep and bear arms,' to treat it as including weapons of this character. . . . The constitution is to be construed as a whole. One part of it is not to be understood in such a sense as will militate against another. It is as well the duty of the General Assembly to pass laws for the protection of the person and property of the citizen as it is to abstain from any infringement of the right to bear arms. The preservation of the public peace, and the protection of the people against violence, are constitutional duties of the legislature, and the guaranty of the right to keep and bear arms is to be understood and construed in connection and in harmony with these constitutional duties."

This construction of the constitutional provision was referred to by Mr. Justice Lumpkin, apparently with approval, in his able and learned opinion in the *Strickland* case, *supra*. But, irrespective of the views entertained by Judge McCay as to the proper construction of this constitutional provision, it must be conceded by every one

that, so far as minors are concerned, the legislature of this State, in the exercise of its police power, has, by the statute in question, absolutely prohibited minors from having about their persons a pistol or revolver. If there was any doubt on this question, or any possibility of a difference as to the constitutionality of that portion of the act of 1910 restricting the right of a minor under 18 years of age to have about his person a pistol or revolver, we would certify this question to the Supreme Court for instruction. But we think the construction which we have given it is so clearly covered by the decision recently made in the *Strickland* case, *supra*, that it would be wholly superfluous to do so.

We are asked by counsel for the plaintiff in error to certify the question to the Supreme Court, so that the decision in the *Strickland* case may be reviewed. We decline to do so. The *Strickland* case is too recent, and so fully meets our own views as to the proper construction of the statute that we do not feel warranted in complying with the request.

Judgment affirmed.

3761. KINARD v. THE STATE.

If a person, being in possession of a house, makes an executory sale thereof to a lewd woman for the purpose that she may conduct it as a lewd house, and she thereupon occupies it and devotes it to that purpose, he stands in such an accessorial relationship to her act as to be indictable under the provisions of the Penal Code (1910), § 382, which makes it a misdemeanor for any person to "maintain and keep a lewd house."

DECIDED NOVEMBER 20, 1911.

Accusation of misdemeanor; from city court of Fitzgerald—Judge Wall. September 19, 1911.

Elkins & Wall, D. E. Griffin, C. B. Teal, for plaintiff in error.

Alex. J. McDonald, solicitor, contra.

POWELL, J. Kinard was indicted under section 382 of the Penal Code (1910), which provides: "If any person shall maintain and keep a lewd house, or place for the practice of fornication or adultery, either by himself or others, he shall be guilty of a misdemeanor." In this State, where no difference between actual principals and those sustaining accessorial relations is made, any one who in any wise aids or abets or assists in keeping or maintain-

ing a lewd house may be convicted as a principal under this section. Under the evidence in this case we would have no hesitancy in affirming the judgment on the ground that there was enough to justify the jury in finding that the defendant gave aid otherwise than by the act which we are about to discuss. However, the court charged the jury as follows: "I charge you in this case that if you find, from the evidence, the truth of this case to be that the defendant, Kinard, in any way let, by sale, or lease, or otherwise, any house in this county, within two years next preceding the date of the accusation, to any person for the purpose of maintaining and keeping a lewd house, and that person to whom he let the said house did actually maintain and keep a lewd house therein, then it would be your duty to convict the defendant." It appeared, from the evidence, that the lewd woman who actually ran the house did not get possession of it from the accused as an ordinary tenant, but that he gave her an executory contract of sale in the nature of a bond for title, whereby she paid \$50 down and was to pay \$8 per month until the full purchase-price had been paid. There was sufficient evidence to justify the charge, so far as it submitted to the jury the question of whether the defendant made this contract for the purpose that the woman to whom he thus gave the possession of the house might use it as a lewd house.

But this charge and the exception to it bring squarely before us the question: Where one makes an executory sale of property to another for the purpose of the latter's keeping a lewd house there, and the latter in fact keeps the lewd house there, does he commit such an act of aiding or abetting or maintaining as to be held accountable under the statute? It is readily conceded by the able counsel for the defendant that one who rents a house with intention that it shall be used for lewd purposes, or with a knowledge that it will be used for those purposes, may be indicted under this statute. They assert that there is a distinction between one who lets out property for this illegal purpose and one who makes a sale of it. We need not discuss what would be the effect of making an absolute sale, for here the defendant made merely an executory sale, by which he turned over to the lewd woman the possession of the property (together with certain equitable rights which need not now be mentioned), reserving the legal title in himself. There is a Kentucky case which gives color to the contention that

the selling of a house for a bawdry is not illegal. *Ross v. Commonwealth*, 2 B. Mon. (Ky.) 417. In Bishop's *New Criminal Law* (8th ed.), § 1093, this case is criticised, and Bishop gives it as his opinion that no distinction is to be made "between the sale in fee and a sale for a term of years. In both instances the transfer carries the entire present possession." A reading of the entire context surrounding the section just cited from Bishop's work shows that as to offenses of this nature the citizen owes to the public, as to property in his possession, not only the negative duty of refraining from actively aiding the nuisance, but also the affirmative duty of not relaxing his control, wherever he has it, in such a way as to facilitate the doing of the forbidden thing by some one else. For example in *Scarborough v. State*, 46 Ga. 26, it was held that, if a man's wife and daughters carried on the practice of fornication and adultery in his home and with his knowledge, he would be guilty of maintaining a lewd house, whether he consented to it or not, provided he did not actively dissent, and did not show that he exercised his powers as head of the family to prevent it.

A person having possession of a house which a lewd woman desires for the purpose of carrying on her practices therein is under the active duty of not renting it to her if he knows that purpose. The law says that he owes that much to society. As to contracts of tenancy this is well settled. But it must be kept in mind that it is not the civil contractual status of the parties that is the important thing in fixing the culpability. It is the landowner's conduct in giving over the possession of the house to the lewd woman, with knowledge of the purpose to which it is to be devoted, that makes him a partner in her crime. In *Kessler v. State*, 119 Ga. 301 (46 S. E. 408), where the lewd woman was a tenant of the accused, the Supreme Court, speaking through Mr. Justice Cobb, in affirming the judgment of conviction, said: "One placing another in possession of a house for the purpose of being used for lewd purposes, or giving possession with knowledge that it is to be so used, directly aids him who is thus placed in possession in the unlawful enterprise by him therein carried on, and is liable to indictment as the keeper of a lewd house." Now possession is just as effectively given under an executory contract of sale as it is under a contract of tenancy. In all such cases the question of legal title or of equitable title has no importance or bearing. It was so held

in the case of *Scott v. State*, 29 Ga. 263, where the crime charged was the maintaining of a gambling-house. See, also, to the same effect, *Stevenson v. State*, 83 Ga. 575 (2), (10 S. E. 234); *Bryan v. State*, 120 Ga. 201 (4), (47 S. E. 574). The wrong which the accused does in such cases is not the parting with his title to some estate or interest in the property, of greater or less duration, but his transfer of the possession, knowing that, if he does transfer it, it will be used for immoral practices. As illustrative of how little cognizance the criminal law takes of civil relationships in determining culpability, we may put this supposititious case: Suppose that a man rushed up to a hardware dealer and said, "Give me a pistol, I want to kill my neighbor," and the shopkeeper said, "No; I will not give you a pistol for that purpose," and the would-be murderer said, "Lend me a pistol," and the dealer replied, "No; I will not lend you one, but I will sell you one, and you may do what you please with it." Would the law make any difference in the culpability of the shopkeeper who parted with the possession of the pistol to a man who he knew was about to commit murder, because the possession was transferred under a contract of sale rather than under a contract of lending or a gift?

It is to be noticed, further, that the instruction complained of did not make mere knowledge that the property might be used for lewd purposes the test of culpability. The instruction was that the defendant would be guilty if he sold or let the property "for the purpose" that a lewd house might be maintained. We can not pronounce this charge erroneous.

There are other assignments of error, but none of them are meritorious or of sufficient importance to justify a reversal.

Judgment affirmed.

3763. WALL v. THE STATE.

POWELL, J. This case arose after the passage of the act approved August 21, 1911 (Acts 1911, p. 149), under which no judgment of a trial court in a criminal case is to be reversed "for lack of proof of venue or of the time of the commission of the offense, save where the particular point has been specifically raised by a ground of the original or amended motion for a new trial." The only point insisted on in this court is that the State did not sufficiently show the time when the

offense was committed, so as to affirmatively prove that it was within the statute of limitations; but the motion for a new trial contains no such specific ground. Hence the act cited applies, and the judgment is affirmed.

Judgment affirmed.

DECIDED NOVEMBER 20, 1911.

Indictment for sale of liquor; from Rabun superior court—Judge J. B. Jones. July 7, 1911.

T. L. Bynum, R. E. A. Hamby, W. S. Paris, for plaintiff in error.
Robert McMillan, solicitor-general, J. C. Edwards, contra.

3764. ABRAM *v.* MAPLES, warden.

1. Where the court sentences a misdemeanor convict in the alternative, directing that he labor upon the public works as the proper authorities of the county may direct, for the space of 12 months, with the privilege of paying a designated fine and costs at any time after entering upon said public works, and thereupon be discharged from custody, and it appears that shortly after the imposition of the sentence, and while the defendant was in the custody of the public authorities of the county, he made a tender of the fine and costs to the sheriff of the county, it was the duty of the sheriff to accept the fine and costs as thus tendered, and to notify the proper authorities, who held the custody of the defendant under the sentence, that it had been fully complied with by the payment of the fine and costs to him; and, upon receiving this notice from the sheriff, it was the duty of the officer holding the custody of the defendant under this sentence to discharge him from further custody.
2. Where a sentence with the alternative of a fine has been imposed in a misdemeanor case, the defendant has the right, as a matter of law, to pay, within a reasonable time, the money required by that part of the sentence; and, upon payment or tender thereof to the sheriff of the county within a reasonable time, he is entitled to be discharged from any further custody under the sentence.

DECIDED NOVEMBER 20, 1911.

Habeas corpus; from city court of Camilla—Judge Dasher. September 15, 1911.

An application for a writ of habeas corpus was brought against the warden of convicts for the county of Mitchell, for the purpose of testing the legality of the warden's custody of Charlie Abram, the husband of the petitioner. The facts are as follows: Charlie Abram entered a plea of guilty of the offense of gaming, in the city court of Camilla, on July 19, 1911, and thereupon the judge of the court imposed upon him the following sentence:

"Whereupon it is considered by the court that the defendant, Charlie Abram, be put to work and labor on the public roads, or such other public works as the proper authorities of said county may direct, for the space of 12 months, with the privilege to pay a fine of \$60, including all costs of this prosecution, and be discharged at any time after entering upon such public work." The day after this sentence was imposed Charlie Abram was delivered by the sheriff of the county into the custody of the respondent as warden of convicts for Mitchell county, and he was put to work upon the public roads of the county. Seven days after the imposition of the sentence B. H. Jones, a citizen of said county, representing the petitioner and Charlie Abram, went to C. D. Crowe, the sheriff of Mitchell county, and made a tender to him of the full amount of the fine imposed, and requested the sheriff to accept it, and demanded the discharge of Charlie Abram from custody. The sheriff refused to accept the money, assigning as a reason for the refusal that the authorities of the county would not discharge him from custody. On August 19th thereafter Jones made a like tender of the fine to the sheriff, which was again refused by him, and for the same reason, and on the following day Jones again made a tender to the sheriff of the fine imposed upon Charlie Abram, and requested him to accept the money, "and have the said Charlie Abram discharged, which said tender the said sheriff refused to accept, and refused to order the said Charlie Abram discharged."

The respondent set up the following reasons why Charlie Abram should not be discharged from his custody: (1) That he holds custody of Charlie Abram as the warden of convicts of Mitchell county, under regular appointment of the prison commission of Georgia, under the sentence imposed by the court, and that the said Abram is under the absolute and exclusive control of the prison commission of Georgia; that the term of the sentence has not expired, and that as warden he has no authority to release the convict, unless authorized to do so by the prison commission of the State of Georgia. (2) That that part of the sentence which reads, "and be discharged at any time after entering upon such public work," is an old printed form and is mere surplusage; that it was not the intention of the judge, in imposing the fine and sentence, to incorporate in his sentence the language quoted, bu

that it was only his intention to give a reasonable time in which to pay the fine after the imposition of the sentence, and that more than a reasonable time had elapsed for this purpose before the fine was tendered to the sheriff. (3) That the sheriff was not the proper officer to whom to make the tender of payment of the fine, or to receive the fine. (4) That no notice or demand of any kind was ever served upon the respondent warden for the release of Charlie Abram; his first notice thereof being the application for discharge under habeas corpus. (5) That no application was made to the prison commission for the release of Charlie Abram, and no notice was ever served on that body or tender made to it, and said commission had the exclusive control of the convicts.

The judge who imposed the sentence testified, that after the imposition of the sentence he had some conversation with the defendant as to the time that would be allowed in which to pay the fine, and that he stated to the defendant that he would have until Mr. Maples, the warden, came after him, which would probably be the next day, and that it was his intention to give the defendant until the next day, or until Mr. Maples came after him, to pay the fine; that the form of the sentence which he used was the general form that had been in use for a number of years, and that he did not consider the language thereof in making out the sentence, simply signing the printed form. This testimony was objected to by the attorney for the petitioner, on the ground that it was irrelevant and immaterial, and was an effort on the part of the judge to change, modify, amend, revoke, and nullify a written sentence and judgment, after the term of the court at which it had been rendered; and the admission of the testimony is assigned as error. The sheriff in his testimony admitted that the tender of the fine had been made to him, and that he refused it, and that, while he did not know whether he was the proper officer to receive fines imposed on prisoners in the city court of Camilla, he did collect most of them.

After hearing the evidence, the court refused to discharge Charlie Abram from custody, and this refusal is assigned as error.

E. E. Cox, for plaintiff. *E. M. Davis*, for defendant.

HILL, C. J. (After stating the foregoing facts.)

1. We think the court erred in not discharging the convict. We are not disposed to be severely technical, or to require strict

compliance with mere formal procedure, when the personal liberty of a citizen is concerned. The question, and the only one, to be determined, is: Is the custody of Charlie Abram, under the admitted facts of this case, legal? It is immaterial that the warden held his position under the prison commission of Georgia, and that neither he nor the prison commission had been given any notice that the fine imposed by the judge had been tendered to the sheriff. The validity of this custody is to be tested by the terms of the sentence imposed upon Charlie Abram, and whether he had complied with its terms; and to test this question it was not necessary for the prison commission or the warden to receive any notice of an effort made by the convict to comply with the terms of the sentence; nor does it matter whether or not the sheriff was, strictly speaking, the officer to whom the tender should have been made and who should have received the fine. We think, however, he was such officer. It is a general practice of sheriffs of this State to collect fines imposed in criminal cases. They are bonded officers of the State, and while it may not be expressly within their duties, in practice it is generally performed by them, and in this case the sheriff states that he had collected the fines imposed in the city court.

2. It is admitted that the tender of this fine was made by the agent of the petitioner and Charlie Abram, the convict, seven days after the fine had been imposed, and this tender was twice repeated a few days thereafter, and the fine was every time refused by the sheriff. The Penal Code (1910), § 1111, provides that "every fine imposed by the court under the authority of this code shall be paid immediately, or within such reasonable time as the court may grant." In the present case the court imposed a fine in the alternative, and gave to the defendant the privilege of paying this fine, including all costs, at any time after entering upon his labor on the public works of the county. Where the courts have a right to impose a fine as a part of the sentence, we think they have also a right to grant to the defendant the privilege of paying it at any time during his period of confinement under the sentence, and the payment thereof should operate as a discharge from further custody. This is a privilege in favor of liberty, and should be left to the discretion of the trial court. Now, in this case the judge who imposed the sentence testified to the effect that it was not

his intention to give such an extended privilege to the defendant in reference to the payment of the fine; that he meant to give only a reasonable time in which to pay it.

We do not think that the testimony of the judge on this point was relevant or material. It certainly could not operate to change the sentence, which was unambiguous. It was the duty of the judge, in the exercise of his discretion, to prescribe at least a reasonable time within which to pay the fine; and even if we disregard the time which he did actually prescribe for that purpose, the law itself would give to the defendant a reasonable time in which to pay the fine, and would declare what would be a reasonable time in each particular case, under the evidence. *Dunaway v. Hodge*, 127 Ga. 690 (55 S. E. 483). In that case the Supreme Court held that 15 days after a fine had been imposed was a reasonable time in which to make a legal tender in payment of the fine and costs, and that it should have been accepted and the prisoner discharged. In the case of *Broomhead v. Chisolm*, 47 Ga. 393, the court decided that the better practice, in imposing a sentence with the alternative of a fine, would be for the judge to fix some reasonable time in which the prisoner might pay the fine, and that, if this was not done, the prisoner would nevertheless be entitled, under the law, to a reasonable time in which to pay it. In the case above mentioned the sentence was imposed on March 12th, and on April 2d thereafter the tender of payment of the fine was made, and the court held that that was a reasonable time. Here the undisputed evidence is that the tender of the fine was made to the sheriff the first time within seven days after the imposition of the sentence. Certainly this was a reasonable time.

The material facts in this case, in our opinion, are fully controlled by the decisions of the Supreme Court in the cases of *Dunaway v. Hodge* and *Broomhead v. Chisolm*, supra; and, under the law as there decided, this court reverses the judgment of the lower court, with direction that Charlie Abram be permitted, by himself or any one acting for him, to pay the fine to the sheriff of the county of Mitchell, or other officer authorized to receive it, and that upon such payment, and notice thereof given to respondent, the warden who has him in custody shall discharge him from custody; otherwise, that he continue to hold in his custody the said Abram.

Judgment reversed, with direction.

3765. CROWDER *et al.* v. MAPLES, warden.

HILL, C. J. This case is controlled by the decision of this court in the case of *Abram v. Maples*, ante, 137 (72 S. E. 932).

Judgment reversed.

DECIDED NOVEMBER 20, 1911.

Habeas corpus; from city court of Camilla—Judge Dasher.
September 15, 1911.

E. E. Cox, for plaintiffs. *E. M. Davis*, for defendant.

3769. THOMAS v. THE STATE.

POWELL, J. The evidence, though slight as to one of the material elements of the case, is not legally insufficient to support the verdict.

Judgment affirmed.

DECIDED NOVEMBER 20, 1911.

Accusation of cheating and swindling; from city court of Abbeville—Judge Nicholson. September 18, 1911.

Dan R. Bruce, for plaintiff in error.

M. B. Cannon, solicitor, contra.

3774. WILLIAMS v. THE STATE.

HILL, C. J. There was no evidence whatever of the *animus furandi*, and the verdict was contrary to law.

Judgment reversed.

DECIDED NOVEMBER 20, 1911.

Conviction of hog-stealing; from Baker superior court—Judge Frank Park. September 25, 1911.

A. S. Johnson, for plaintiff in error.

W. E. Wooten, solicitor-general, *F. A. Hooper*, contra.

3776. JACKSON v. THE STATE.

This case is controlled by *Cassidy v. State*, ante, 123 (72 S. E. 939).

DECIDED NOVEMBER 20, 1911.

Accusation of sale of liquor; from city court of Macon—Judge Hodges. September 23, 1911.

John R. Cooper, Napier & Maynard, for plaintiff in error.

Walter J. Grace, solicitor-general, contra.

POWELL, J. The evidence in this case is of the same general nature as that dealt with in *Cassidy v. State*, ante, 123 (72 S. E. 939), this day decided. Shipments marked "whisky" came addressed to the accused. He gave to the railroad agent orders directing that the whisky shipped to him be delivered to certain draymen, who hauled it to his place of business. Sometimes the draymen left it inside the store, and sometimes in the back yard, near the back door of his store. The defendant had a government tax receipt as a retail liquor dealer. He did make a statement in which he denied that any whisky had ever been brought to his store by the draymen; but the jury, as they had the right to do, disregarded this statement, in the light of the overwhelming evidence to the contrary. The jury had a right to find, even as to the liquor left in the back yard of his store, that it was left "at his place of business." *Bashinski v. State*, 5 Ga. App. 3 (62 S. E. 577); *Jenkins v. State*, 4 Ga. App. 859 (62 S. E. 574).

Judgment affirmed.

3813. HAMMOND v. THE STATE.

1. In the construction of general and special acts, the maxim "*generalia specialibus non derogant*" applies, and a general act will be held to repeal or modify a special act embraced within the terms of the general act only when the provisions of the two acts are clearly repugnant and irreconcilable, or where the provisions of the general act manifest that it was the intention of the legislature to enact a general law on the subject-matter which should be exhaustive and a substitute for every prior general, local, and special law relating to the subject-matter.
2. The general law on the subject of the protection of game in this State, approved August 21, 1911 (Acts 1911, p. 137), was intended by the legislature to be exhaustive of the subject, and was intended to repeal all existing general, special, or local laws on the same subject-matter.

DECIDED NOVEMBER 20, 1911.

Accusation of violation of game law; from city court of Blakely—Judge Rambo. October 28, 1911.

Hawes, Pottle & Wright, for plaintiff in error.

Walter Park, solicitor, contra.

HILL, C. J. An accusation in the city court of Blakely charged Ernest Hammond with a violation of the act to prohibit the killing of certain game in Early county, approved August 17, 1911 (Acts 1911, p. 417). On arraignment the accused made a written motion to quash the accusation, on the ground that it charged no offense against the laws of this State: (1) because the above-mentioned local law is in conflict with article 1, section 4, paragraph 1, of the constitution of Georgia (Code of 1910, § 6391), which prohibits the enactment of a local or special law in any case for which provision has been made by an existing general law, and this local law conflicts with section 586 of the Penal Code of 1910; and (2) because the local law in question has been repealed by the general game law of the State, approved on August 21, 1911 (Acts 1911, p. 137). The court overruled the motion to quash the accusation, and this judgment is assigned as error.

The local law under which the accusation is framed is entitled "An act to prohibit the killing of doves, partridges, and quail in the county of Early for a period of five years, and for other purposes, and to provide for a penalty for a violation of the same." Section 1 provides that from and after the passage of the act "it shall be unlawful for any person or persons to shoot, kill, trap, ensnare, or destroy in any way, any dove, partridge, or quail, for a period of five years from the passage of this act, in the county of Early, in the State of Georgia." Section 2 makes a violation of this act a misdemeanor, and prescribes the punishment provided for in section 1039 of the Penal Code of 1895. Section 3 repeals conflicting laws. When this local law was passed, the general law on the subject, as contained in section 586 of the Penal Code of 1910, made it a misdemeanor for a person to "shoot, trap, kill, ensnare, net, or destroy, in any manner, any wild turkey, pheasant, partridge or quail, between the fifteenth day of March and the first day of November in each year," or to "kill, shoot, trap, ensnare, net, or in any manner destroy any dove, marsh-hen, or snipe, between the fifteenth day of March and the fifteenth day of July in each year." The accusation in the present case charged that the accused, on the 27th day of October, 1911, in Early county, did unlawfully shoot and kill one dove, in violation of the act of the legislature approved August 17, 1911, prohibiting the shooting of doves and other game birds in Early county from the date of the passage of said act.

The general act of the General Assembly, approved August 21, 1911 (Acts 1911, p. 137), need not be set out in full. It is manifest from the act, considered as a whole, that it was intended to embrace all the law on the subject of the protection of game in this State. The act establishes a department of game and fish for the State, provides a State game and fish commissioner, game wardens, and deputy game wardens, and was clearly intended to cover the whole subject of protection of game in this State, and to fix and prescribe the only rules in respect thereto, and it was also intended by the legislature that it should act as a repeal of all former statutes, either general or local, relating to the same subject-matter, whether they were, in direct words, repugnant to this act or not; and we are clearly of the opinion that this general act, by terms, expressly covers the whole subject-matter of the protection of game in this State. If the first point made by the demurrer to the accusation is well taken, to wit, that this local act for Early county conflicts with the provision of the constitution which prohibits the enactment of a local law where the same subject-matter is covered by a general law, in our opinion the local law would be inoperative, null, and void, as being in conflict with this provision of the constitution, under repeated rulings of the Supreme Court, beginning with the decision in the case of *Papworth v. State*, 103 Ga. 36 (31 S. E. 402), which has been followed in numerous decisions.

Unquestionably the general act, as contained in section 586 of the Penal Code of 1910, applied to the shooting of the game specified in the special or local act for Early county. But inasmuch as this law, in our opinion, was itself repealed by the general law on the subject, approved August 21, 1911 (Acts 1911, p. 137), the only material question for this court to decide is whether or not the special law for Early county has been repealed by the general law subsequently approved. It is the established rule of construction that the law does not favor a repeal by implication, and that, where there are two or more provisions relating to the same subject-matter, they must, if possible, be construed so as to maintain the integrity of both. 1 Lewis's Sutherland on Statutory Construction (2d ed.), § 27. And it follows that, as a rule, general laws will not impliedly repeal those which are special or local; in other words, that a general statute, without express re-

pealing words, will not repeal by implication the provisions of a former special, local, or particular law which is limited in its application, unless there is something in the general law upon the subject-matter that makes it manifest that the legislature contemplated and intended a repeal; or, to express it otherwise, in the construction of general and special acts, the maxim "*generalia specialibus non derogant*" applies, and a general act will not be held to repeal or modify a special one embraced within the general terms of the general act, unless the two acts are so repugnant or irreconcilable as to indicate a legislative intent to modify or repeal the other.

But it is manifest that the general act in this instance is a general revision of the whole subject-matter, and was intended by the legislature to be exhaustive as to that subject-matter. *Florida v. Southern Land & Timber Co.*, 45 Fla. 374 (33 South. 999); *Village of Ridgway v. County of Gallatin*, 181 Ill. 521 (55 N. E. 146); *State v. Archibald*, 43 Minn. 328 (45 N. W. 606), and many cases there cited. This whole question of construction is summed up in a headnote in the case of *Davis v. Dougherty County*, 116 Ga. 491 (42 S. E. 764), in the following language: "A general law will not be so construed as to repeal an existing particular or special law, unless it is plainly manifest, from the terms of the general law, that such was the intention of the lawmaking body." These rules of construction apply both to the subject of the repeal of a general law by a subsequent general law, and the repeal of a special or local law by a general law. They are axiomatic, and need no further discussion. It remains only to make an application of these rules to the particular statutes now under consideration.

The local act for Early county prohibits the killing of game birds, therein described, for a period of five years. The general act on the same subject (Acts 1911, p. 140, section 6) fixes the hunting season, and, among other things, provides that "any resident of the State may procure a license to hunt in his residence county upon the payment of the sum of one dollar. License to such resident shall be issued authorizing him to hunt throughout the State upon the payment of three dollars." And it further provides that "license shall be issued to non-residents of the State upon the pay-

ment of the sum of fifteen dollars, which shall authorize such non-resident to hunt throughout the State." The act creates a game warden and deputy game wardens, and prescribes their terms of office and their duties, among which is to grant the licenses provided for by the act. Clearly these provisions of the general act are in irreconcilable conflict with that provision of the local act which prohibits any person, whether with or without license, from killing in Early county, in five years, any of the game birds mentioned in both of the acts. As to this provision the two acts can not stand together, and therefore the general act is paramount and necessarily repeals that provision of the local act. Further, the penalty prescribed is different. But, as before suggested, this general act, establishing the department of game and fish for the State of Georgia, was intended to be exhaustive of the subject-matter, and was manifestly intended by the legislature to repeal all general or special or local laws on the same subject-matter, and, for this additional reason, even if the provisions of the two statutes were not directly repugnant, the local law for Early county was repealed by the general act subsequently passed. The accusation should therefore have been quashed. *Judgment reversed.*

3611. KIDD v. STATE.

1. Where, prior to an announcement of ready, by both sides, the judge makes a complimentary remark as to credibility of one of the State's witnesses, subsequently sworn as a witness in the case, the remark being made in the hearing of the jury, and thereafter the defendant, without objection, goes to trial before the jury and is convicted, it is too late to complain for the first time, by motion for a new trial, that the judge erred in making the remark referred to.
2. The defendant was indicted for assault with intent to murder, and was convicted of unlawfully shooting at another. He can not complain that the judge erred in charging the jury as to the law of voluntary manslaughter. It conclusively appears that he could not have been injured by such charge.
3. The evidence amply authorizes the verdict, and no error of law appears.

DECIDED NOVEMBER 20, 1911.

Indictment for assault with intent to murder; from Madison superior court—Judge Meadow. June 9, 1911.

J. F. L. Bond, James H. Skelton, for plaintiff in error.

Thomas J. Brown, solicitor-general, contra.

RUSSELL, J. 1. From the 4th ground of the motion for a new trial it appears, that after the case had been called for trial and both sides had announced ready, counsel for the prosecution announced that the State was ready for trial, provided Stephen O'Kelley, a witness for the State, was present; that he had been called, but had not responded. The presiding judge inquired if the witness had been subpoenaed. Counsel replied that he had been, and had promised to be on hand that morning. The judge then said: "If Mr. O'Kelley, the witness, told you that he would be here, you can count on his being here. I know him, and have known him from his childhood. I know his father. Whatever Stephen O'Kelley tells you, you can rely on it. The court will announce ready for the State." All this occurred in the presence of the jury. It is alleged that the court erred in thus commending the witness, because the jury were thereby influenced to believe his testimony in preference to the defendant's statement, which was in conflict with it.

If the probable effect of the judge's language in regard to this witness was as stated in this ground of the motion for a new trial, the accused and his counsel knew it before accepting the jurors and entering upon the trial. So far as appears, there was no objection to it until after the verdict had been rendered. "A defendant can not sit idly by and accept jurors without objection, take the chance of obtaining an acquittal, and then complain that they were influenced by a fact of which he was aware and to which he did not object before they were sworn." *White v. State*, 7 Ga. App. 22 (65 S. E. 1074). As to the proper mode of objection, see *Smith v. State*, 7 Ga. App. 252 (66 S. E. 556), and *Perdue v. State*, 135 Ga. 277. The decisions cited in support of this ground of the motion for a new trial relate to language used to or in the presence of the jury during the trial, and not to language used before entering upon the trial.

2, 3. The indictment was for assault with intent to murder. It alleged that the offense was committed by shooting a named person with a pistol. The verdict was that the defendant was "guilty of shooting another unlawfully." It is contended in behalf of the accused that there is no such offense as this, and that the verdict

is void for uncertainty. There is no merit in this contention. Under an indictment containing a single count for assault with intent to murder, there may be a conviction of the statutory offense of shooting at another, that being a lesser offense of the same general character. *Rhinehart v. State*, 7 Ga. App. 425 (66 S. E. 982); *Wostenholms v. State*, 70 Ga. 720; *Watson v. State*, 116 Ga. 607 (43 S. E. 32). "Verdicts are to have a reasonable intendment, and are to receive a reasonable construction, and are not to be avoided unless from necessity." Penal Code (1910), § 1059. It was clearly the intention of the jury in this case to find the accused guilty of the offense of shooting at another (Penal Code of 1910, § 115), as to which the court had fully instructed them. It was not necessary for the verdict to negative the statutory exception by stating that the shooting was "not in his own defense or under circumstances of justification." *Arnold v. State*, 51 Ga. 144; *Isom v. State*, 83 Ga. 378.

Complaint is made as to the "qualified manner" in which the court gave in charge to the jury the provisions of the Penal Code as to voluntary manslaughter. This did not hurt the accused, for the principles of the law of voluntary manslaughter were applied in his behalf, when the jury found him guilty of shooting at another, instead of assault with intent to murder. By this verdict for the lesser offense he got all the benefit he could have derived from a correct charge on the law of voluntary manslaughter.

Some of the grounds of the motion for a new trial complain that the court erred in not giving to the jury certain lengthy and detailed instructions set out in the motion; but it does not appear that these instructions were requested on the part of the accused.

The evidence amply authorizes the verdict, and no error of law appears.

Judgment affirmed.

3682. GRUSIN v. THE STATE.

1. There was no abuse of discretion in overruling the motion for a continuance.
2. The evidence amply authorizes the verdict of guilty, and no error of law appears.

DECIDED NOVEMBER 20, 1911.

Accusation of misdemeanor; from city court of Richmond county—Judge W. F. Eve. August 1, 1911.

Isaac S. Peebles Jr., for plaintiff in error.

J. C. C. Black Jr., solicitor, *John M. Graham*, contra.

RUSSELL, J. Grusin was convicted under an accusation charging him with having violated the prohibition law by selling intoxicating liquors, and by keeping such liquors on hand at his place of business. He excepts to the refusal of a new trial.

As to the general grounds of the motion for a new trial it is sufficient to say, that there was proof that on the day alleged in the accusation, a policeman, who searched the grocery store and adjoining "near beer" saloon of the accused, found in both places a large quantity of whisky in bottles,—enough to make a wagon-load, and that the accused begged him not take it all, but to take "just enough to make out a good case;" and that others testified to both the keeping and the frequent selling of intoxicating liquors by the accused at his place of business.

The next ground of the motion for a new trial is that the court refused the defendant a continuance upon the following showing: The defendant testified, that he was arrested and was required to sign two appearance bonds,—one for his appearance before the recorder of the city of Augusta on the charge of violating the city ordinance as to keeping liquor on hand for illegal sale, the other for his appearance at the city court on the charge of violating the State prohibition law; that he understood that his trial before the recorder was for the purpose of determining not only as to violation of the city ordinance, but also as to whether there was sufficient evidence to bind him over to the city court, the recorder being also a committing officer; that the trial before the recorder resulted in his dismissal, and he was under the impression that this dismissal carried with it a dismissal of the State charge; that at the March term of the city court, at which the motion for a continuance was made, he looked over a list of the cases assigned for that term, published in one of the daily newspapers of the city, and his case was not listed there; that he was notified the day before the trial that his case would come up about 3 o'clock in the afternoon, and he immediately employed counsel to defend him; that "there was a witness, Annie Spires, in Columbia county, Georgia, who was present on the Sunday that John Bird contended that

he bought whisky from defendant, and who would have testified that defendant sold no whisky, but he had not had an opportunity to procure said witness at the present trial, and had not had an opportunity to prepare his defense." The defendant's counsel stated that he could not safely go to trial, owing to the fact that he was employed the day before in the afternoon, and had not had an opportunity to examine the witnesses. Although the accusation had been drawn a week before the trial, and the case had been assigned for trial, the solicitor did not sign the accusation until the night before the trial. It was testified that the defendant's bondsman had been notified several days before the case came up for trial that it would be tried. The defendant denied that he had received notice from his bondsman, but it is stated that "his bondsman had called up his place and stated that said case would be tried on the 14th of April, and told his clerk, who notified defendant." The trial was on the 20th of April. The warrant on which the accusation was based was sworn out on the 20th of February, and its issuance was immediately followed by his arrest and the giving of the bond by which he obligated himself to appear at the March term of the court to answer this charge.

There was no abuse of discretion in refusing a continuance on this state of facts. "The party making an application for a continuance must show that he has used due diligence." Penal Code (1910), § 991. It can hardly be seriously contended that this defendant used due diligence, when, instead of regarding the requirement of his appearance bond and making due inquiry as to his case in the State court, he assumed that he was relieved from any further duty in the matter by the dismissal of a different charge against him in a municipal court and by the fact that the recorder did not bind him over upon a charge which he had already given bond to answer in the State court, or that he was entitled to rely upon a newspaper report which did not mention his case in giving a list of cases assigned for trial; especially when "his bondsman had called up his place and stated that said case would be tried on the 14th of April," which date was six days before the date of the trial, "and told his clerk, who notified defendant." It was his own fault if his counsel did not have sufficient time to prepare his defense. Moreover, it appears that after the employment of counsel, there was a part of a day, a night, and un-

til three o'clock in the afternoon of the next day in which to prepare for trial; it does not appear that his counsel was ill or occupied with other cases; the witnesses were few, and there is nothing to indicate that in the development of the facts anything would have been gained for the defendant by delay, or that he was not as well defended as he would have been if a postponement had been granted. Only one of his witnesses was absent, and the statement that he "had not had an opportunity to procure said witness at the present trial" falls short of the showing required by the Penal Code (1910), § 987. Besides, it seems that her testimony would have been of merely negative character and would have related to but one sale, and the case was abundantly made out by proof as to other sales and as to the keeping of liquor. Injury to the accused must clearly appear, before a reversal will be granted for refusal to postpone. *Hightower v. State*, 9 Ga. App. 236.

It is complained that the court erred in admitting testimony of Britt, a police officer, as follows: "Gus Hughes and Felix Apperson brought that whisky to me at the police headquarters. I have tasted pretty near all kinds of gin, and it is intoxicating. I gave Gus Hughes \$1 to see if he could buy some whisky. He remained away probably three quarters of an hour or an hour, when he returned and brought me that bottle of whisky and another bottle half full." The sole objection made to this testimony was that "any sayings had out of the presence of the defendant would not be binding upon the defendant, and were hearsay." This testimony, however, does not give any sayings; and it was clearly admissible in connection with the testimony of Gus Hughes as to his having delivered to this witness whisky which he had bought from the defendant with \$1 which had been given to him by the witness for that purpose.

The allowance of a leading question, as to which complaint is made in the 6th ground of the motion for a new trial, was a matter within the discretion of the trial judge.

John Bird testified to a sale of whisky by the defendant to one Stetson on "the 20th of last February." This testimony was objected to (1) because it was not offered until after the State had made out its main case and rested, and the defendant had put in his evidence, and it was not in rebuttal, but related to a separate criminal transaction from the one made out in the main case;

and (2) because it was irrelevant, the date of the warrant being the 20th of February, and it being incumbent on the State to show that the sale occurred prior to the issuing of the warrant. Reopening the case for the reception of additional evidence was discretionary with the court; and the defendant was not surprised by this testimony, for a postponement of the case had been asked before the trial began, in order to procure a witness to rebut it. As to the date of the sale, the witness testified positively that the day was Sunday. The calendar shows that the 20th of February was on Monday. The jury were authorized to believe that he was correct as to the day of the week and in error as to the day of the month,—that is, that the date of this sale was the 19th, instead of the 20th. The judge instructed them that they could not consider any sale occurring after the swearing out of the warrant.

There is no merit in the contention that the statute forbidding the expression or intimation of an opinion by the court as to the facts, in charging the jury, was violated by the statement, "That makes the crime complete," etc., in the following instruction: "If you find that he carried on any mercantile business or carried on a 'near beer' establishment, and that he had prohibited liquors at his 'near beer' saloon, then he would be guilty of violating the law, even if there is no evidence of a sale or giving away. That makes the crime complete—having it at his place of business."

Reading in connection with its immediate context the extract from the instructions of the court on the effect of evidence of good character, it is not subject to the objection made in the motion for a new trial. Besides, there was no evidence on which to base a charge on this subject.

There is no other ground requiring a new trial.

Judgment affirmed.

3618. STANLEY *v.* THE STATE.

RUSSELL, J. The circumstantial evidence, in connection with the incriminatory admission of the defendant, sufficiently proves the corpus delicti. See *Garnett v. State*, ante, 109 (72 S. E. 951). The verdict of guilty is amply supported by the evidence, and the record is free from material error.

DECIDED NOVEMBER 20, 1911.

Indictment for larceny from house; from Bibb superior court—Judge Felton. July 6, 1911.

B. J. Fowler, for plaintiff in error.

Walter J. Grace, solicitor-general, contra.

3197. PUFFER MANUFACTURING CO. *v.* RIVERS *et al.*

1. A judgment of a court of competent jurisdiction is conclusive between the parties and their privies, as to all matters put in issue, or which, under the rules of law, might have been put in issue, in the cause wherein the judgment was rendered.
2. Where suit is brought, by the payee of a series of notes given for the balance of the purchase-price of an article, on one or more of such notes, and the defendant pleads failure of consideration, a verdict and judgment in his favor can be pleaded as *res judicata* to a suit on the other notes of the same series.

DECIDED DECEMBER 19, 1911.

Attachment; from city court of Atlanta—Judge Reid. December 12, 1910.

The Puffer Manufacturing Company sold to the defendants a soda fount and apparatus for \$530, of which sum the defendants paid \$25 cash and \$25 on delivery of the fount, executing for the balance a series of monthly promissory notes containing the usual clause that, in the event of default in the prompt payment of one note, the holder might at his option elect to treat the entire series as due and collectible. The defendants paid \$150, and, on their refusal to pay the balance, the plaintiff instituted suit in a justice's court on the five notes past due at that time, aggregating \$75. The defendants pleaded that the consideration of the notes had totally failed, in that the apparatus was utterly unsuited for the purpose for which it was bought. They further pleaded, by way of recoupment, that through leakage in certain parts of the apparatus, they had sustained a loss of \$50 worth of syrups and mineral waters. Judgment against the plaintiff was asked, for \$100, for breach of contract, and also for \$150 as the amount paid on the purchase-price of the apparatus. On appeal to the superior court the jury found a verdict in favor of the defendants. Subsequently the plaintiff instituted suit on the other notes, by levying a purchase-money attachment on the apparatus. The defendants

pleaded *res judicata*, and, on the trial of this issue, introduced the pleadings and the verdict and judgment in the former suit. There was no other evidence, and the judge directed the jury to return a verdict sustaining the plea of *res judicata*. The plaintiff excepts to this ruling.

Joseph D. Green, Dorsey, Brewster, Howell & Heyman, for plaintiff. *Thomas L. Bishop*, for defendants.

RUSSELL, J. We think the court properly ruled in favor of the plea of *res judicata*. There was one entire contract between the parties, growing out of the purchase of a soda fount and apparatus, and the serial notes merely evidenced the time and manner of payment. When sued on one of the serial notes, it was proper to give in evidence, under a plea of total or partial failure of consideration, that one or more of the notes had been paid. *Crouch v. Spooner*, 9 Ga. App. 695 (5), (72 S. E. 61). Likewise, it would be relevant to show that there were other notes outstanding, not yet due or paid. The issue, therefore, on the first trial, was whether the soda fount and apparatus was worth more than the sum which had already been paid, namely, \$150. The defendant contended that it was utterly worthless, and asked, not only a return of the amount paid, but also special damages in the sum of \$100. The jury found a verdict in favor of the defendant, without allowing the special damages, thereby adjudicating necessarily one or the other of two things, to wit, that the soda fount and apparatus was worth either \$150 or \$250, and no more. If the jury believed that the defendant had really suffered the special damages sought to be recouped, and that under the charge of the court such damages could be allowed, then their verdict indicates that the soda fount and apparatus was worth, in their belief, \$250, and no more. If no such special damages were allowed, then the verdict indicates that the apparatus was worth the sum already paid, namely, \$150, and no more. This was the controversy between the parties, which the jury settled in favor of the defendant.

"A judgment of a court of competent jurisdiction is conclusive between the same parties and their privies, as to all matters put in issue, or which under the rules of law might have been put in issue, in the cause wherein the judgment was rendered." Civil Code (1910), § 4336. "Any conclusion which the court or jury must evidently have arrived at in order to reach the judgment or

verdict rendered will be fully concluded." *Kelly & Jones Co. v. Moore*, 128 Ga. 683, 686 (58 S. E. 181). However, if the defendant had not pleaded the failure of consideration in the first case, thereby raising the question, the principle of the case of *Worth v. Carmichael*, 114 Ga. 699 (40 S. E. 797), would have been applicable, and there would have been no estoppel.

The case at bar is very similar in principle to that of *Kennedy v. McCarthy*, 73 Ga. 346, in which one employed under contract for a year, with salary payable monthly, was discharged during the year, and, at the end of the first month thereafter, sued for the salary of that month. The employer defended on the ground of the incompetency of the employee, and claimed he had a right to discharge him. The jury found a verdict for the plaintiff. Subsequently the employee sued for other months during the year, and the employer sought to interpose the same defense; but the court held that the decision in the first case was conclusive as to the same defense in the second. The only substantial difference between that case and this one is that here the shoe pinches the other foot. Here the seller held a lot of notes, all of which were parts of the same contract, and all of which were, at his option, due and collectible. He elected to sue merely on some of the notes, and the defendants assert a defense which went to the very heart of the entire contract, and the issue terminated in their favor.

Now, by instituting suit on other notes under the same contract, the plaintiff seeks to reopen the old controversy, and force the defendant again to assert the same defense of failure of consideration. If this could be done, then the plaintiff could have instituted a separate suit on every one of the 35 notes, and thus have forced the defendant to assert and prove the same defense as to every one of them. The law of *res judicata* is intended to put an end to litigation, and where one controversy between the same parties has been fully heard on the merits and determined, the matter should be dropped.

There was no error in directing a verdict in favor of the defendant.

Judgment affirmed.

3212. SOUTHERN RAILWAY CO. *v.* STROZIER & WATERS.

1. It is well settled that, to support an action of trover, the plaintiff must show either title in himself at the time when the suit was commenced, prior possession, or the right of possession.
2. "Where a bill of lading is attached to a draft drawn on a third person, it will be treated as security for the draft, and neither title to the goods, nor right to the bill of lading, will pass to the drawee until, as required therein, he accepts, or accepts and secures, or pays the draft, as the case may be."
3. While the general rule is that where one orders goods to be shipped by a common carrier, and the order is accepted and the goods shipped, a delivery to the carrier is a delivery to the purchaser, the carrier being the agent of the purchaser to receive them, and when this is done the title passes from the vendor to the vendee, this general rule is subject to exception. If for any reason the seller, at the time of the shipment and delivery of the goods to the common carrier, takes a bill of lading to his own order, and attaches thereto a draft for the purchase-money, he thereby expresses his intention to retain the title until the draft is paid, or accepted and secured; and, where this method of shipment is adopted, the carrier becomes the agent of the seller or consignor, and would be authorized to deliver the goods only on a surrender to it of the bill of lading.
4. This case is fully controlled by the decision of this court in *Moss v. Sell*, 8 Ga. App. 588 (70 S. E. 18), and the decision of the Supreme Court in *Erica v. Harris*, 87 Ga. 335 (13 S. E. 513).
5. The judgment in favor of the plaintiff was unauthorized, and a non-suit should have been awarded.

DECIDED DECEMBER 19, 1911.

Trover; from city court of Savannah—Judge Davis Freeman.
January 22, 1911.

Strozier & Waters sued the Southern Railway Company in trover in the city court of Savannah to recover bed lounges shipped by the Johnson Manufacturing Company at Fayetteville, N. C., to its own order at Savannah, Ga., with direction to notify Strozier & Waters. The facts are not in dispute, and, briefly stated, are as follows: Strozier & Waters gave an order for seven lounges, aggregating in price the sum of \$47, to a salesman of the Johnson Manufacturing Company on February 17, 1910, the terms to be 60 days from March 1. On receipt of this order the Johnson Manufacturing Company wrote to Strozier & Waters, requesting a deposit of \$10 on account, and this deposit was made. Finding that Strozier & Waters had no commercial rating, the Johnson Manufacturing Company made a shipment of the seven lounges at Fayetteville, N. C., to itself at Savannah, with order to notify Stro-

zier & Waters, attached a bill of lading to a sight draft on Strozier & Waters, and placed it in the bank for collection. Strozier & Waters were then duly notified of the method of shipment and were requested to pay the draft. They refused to pay the draft, and the railroad company refused to deliver possession of the goods to them, unless the bill of lading was surrendered, and upon this refusal Strozier & Waters instituted proceedings in trover, claiming title to the shipment. The case is before us on exceptions to the refusal of the court to grant a nonsuit, and also to the final judgment rendered in favor of the plaintiffs. The questions raised by the record are as follows: (1) Can an action in trover be sustained without showing either title, prior possession, or the right of possession? (2) Where a vendor makes a shipment by means of a common carrier, to his own order, with directions to notify a third person at destination, and the bill of lading is attached to a sight draft for collection, drawn on such third person, does any title pass to the third person until payment is made of the draft, or rightful possession of the bill of lading obtained? (3) Where a shipment is made to the order of the consignor, with direction to notify a third person, and a sight draft is deposited for collection, is not the carrier justified in refusing to deliver, until presentation of the bill of lading; and can a recovery as for a conversion be had against the carrier for a refusal to deliver until presentation of the bill of lading, under these facts?

E. H. Abrahams, Osborne & Lawrence, for plaintiff in error.

A. L. Alexander, Alexander R. Lawton 3d, contra.

HILL, C. J. (After stating the foregoing facts.) It is well settled that to support a recovery in an action of trover the plaintiff must show either title in himself, prior possession, or right of possession. *Mitchell v. Georgia & Alabama Ry.*, 111 Ga. 760 (36 S. E. 971, 51 L. R. A. 622). In this case the plaintiffs rely upon title to the shipment in question. They contend that the payment of the deposit of \$10 and the delivery of the goods to the carrier operated to fix this title in them; that the contract of sale was fully executed and was not in any sense executory; and that the railroad company held possession of the goods as their agent and not as the agent of the consignor.

Unquestionably it is a general rule that delivery to the carrier of goods purchased is delivery to the consignee; but this general

rule may be varied by a manifest exception thereto made by the vendor at the time of shipment. At the time of shipment in this case the Johnson Manufacturing Company expressly reserved title to the shipment, by taking a bill of lading to its order, and attached to the bill of lading a sight draft for collection.

Section 4134 of the Civil Code (1910) provides that in such case no title passes until the drawee pays the draft thus drawn upon him. "When a bill of lading is attached to a draft drawn on a third person, it will be treated as security for the draft, and neither title to the goods, nor right to the bill of lading, will pass to the drawee until, as required therein, he accepts, or accepts and secures, or pays the draft, as the case may be." When the Johnson Manufacturing Company consigned the shipment to itself, with order to "notify Strozier & Waters," this was equivalent to a positive statement that it did not intend to part either with the title to the shipment or the possession thereof until this draft was paid.

The case of *Erwin v. Harris*, 87 Ga. 335 (13 S. E. 513), seems to us controlling on this point. In that case a sale of oats was offered by a party in Texas to the vendee in Georgia. The vendee replied, offering to take five car-loads f. o. b. at a Texas point, and the offer was accepted. The vendor shipped the oats, sending a draft for collection, with the bill of lading attached, and the vendee claimed title. The court ruled as follows: "The general rule is that when one orders goods from a distant place to be shipped by a common carrier, and the order is accepted and the goods shipped, a delivery to the common carrier is a delivery to the purchaser, the common carrier being the agent of the purchaser to receive them; and, when this is done, the title, without more, passes from the vendor to the vendee." Now note the exception: "If, however, the vendor of the goods is not satisfied of the solvency of the purchaser, or is doubtful thereof, or wishes to retain the title in himself, he may vary this rule, when he makes the consignment and delivers the goods to the carrier, by taking a bill of lading from the carrier to his own order. When the vendor does this, it is evidence that he does not part with the title of the goods shipped, but retains the same until the draft which he sends with the bill of lading is accepted or paid; and, when the title is thus reserved in the vendor or consignor, the carrier is his agent and not the agent of the consignee, and the risk is the consignor's and not the

consignee's. Erwin, the consignor, having taken the bill of lading to his own order and attached it to the draft drawn on Harris, and sent them to the bank in Macon, Ga., delivery to the carrier in Texas was not a delivery to Harris. Under these facts, the title remained in Erwin, the consignor, and the delivery to Harris was contemplated to be at his residence in Macon; payment of the price to be made by him there on delivery." See, also, to the same effect, *F. C. & P. Railroad Co. v. Berry*, 116 Ga. 19 (42 S. E. 371), and the decision of this court in *Moss v. Sell*, 8 Ga. App. 588 (70 S. E. 18). In the case decided by this court, referring to the conduct of the consignor in the method of shipment, it is said that "the seller thereby expresses his intention not to part with the title to the goods shipped to the buyer until his draft attached to the bill of lading is accepted and paid." The facts in the case sub judice are almost identical with the facts in the case of *Erwin v. Harris*, supra; the only difference being the payment of the \$10 deposit by Strozier & Waters as required by the Johnson Manufacturing Company. This payment of \$10 was simply a payment on account, and to this extent it gave to the purchasers an interest in the shipment, but it did not fix the title to the shipment in them, in the face of the express declaration on the part of the consignors, as shown by their method of shipment, that the title to the shipment was reserved until the purchase-price was fully paid by the consignees. Here the vendors were not satisfied of the solvency of the vendees. They found that the vendees had no commercial rating, and therefore the vendors exercised their right to protect themselves by consigning the shipment to themselves in Savannah and attaching a draft to the bill of lading. In the case of *Mathewson v. Belmont Flouring Mills Co.*, 76 Ga. 359, it was distinctly held that, where goods were shipped with sight draft and bill of lading attached, the return of the draft accepted or paid was a condition precedent to fix the title, and until this was done no title passed.

We might rest the decision of the case here, since by the authorities cited applicable to the facts, which are not in dispute, the plaintiffs in the court below not only failed to show any title in themselves to the shipment, but expressly showed that the vendor, Johnson Manufacturing Company, had reserved title in itself until the draft was paid. The carrier had knowledge of the method of shipment. It had the absolute right to refuse to deliver the ship-

ment, made as it was, without a surrender of its bill of lading. If it had delivered the shipment to the consignees without the bill of lading, it would have been in law liable to the vendors for any consequent loss, for the carrier is bound to see that it delivers a shipment only to the proper person designated by the consignor. Where a bill of lading covering a shipment has been issued, the carrier may demand its production as a condition precedent to making delivery. *Atlantic & Birmingham Ry. Co. v. Spires*, 1 Ga. App. 22 (57 S. E. 973); *Sellers v. Savannah, Florida & Western Ry. Co.*, 123 Ga. 386 (51 S. E. 398). It follows from the foregoing that a refusal by the railroad company to deliver the shipment to the consignees, under the facts as stated, did not amount to a conversion by the carrier, but that the carrier, in refusing to deliver without a surrender of its negotiable bill of lading, was standing squarely upon its rights.

We conclude, therefore, that the trial court erred in not awarding a nonsuit, and that the judgment against the defendant was unauthorized.

Judgment reversed.

3224. FINE & BROTHER v. SOUTHERN EXPRESS CO.

1. The action was for breach of contract, and the justice's court had jurisdiction. If there is doubt as to the form of a suit, the construction favorable to the jurisdiction should be adopted, but, under the allegations of the petition here, there is no doubt that the suit was on the contract of carriage, for breach thereof, and consequent damage.
2. A justice of the peace should not direct a verdict.
3. Where a common carrier has breached his contract by failure to deliver the goods intrusted to him, and admits that they were lost while in his possession, he is not entitled to be paid the freight, or to have the amount of the freight deducted from the verdict for the value of the lost goods.
4. The shipper neither, by omission or commission, perpetrated nor attempted to perpetrate a fraud upon the carrier, and the undisputed evidence proved that he was entitled to recover the value of his goods, because of the breach of the contract by the carrier.

DECIDED DECEMBER 19, 1911.

Certiorari; from Fulton superior court—Judge Ellis. January 12, 1911.

C. B. Rosser Jr., for plaintiffs.

Robert C. & Philip H. Alston, McDaniel & Black, for defendant.

HILL, C. J. William Fine & Brother (engaged in the novelty jewelry business in Atlanta, Ga., and Chattanooga, Tenn., under the name of the Radius Jewelry Company) delivered a package containing 145 articles of their novelty jewelry to the Southern Express Company in Atlanta for transportation and delivery to the Radius Jewelry Company in Chattanooga, under a contract made with the express company. The package was lost by the express company, and the shippers brought suit against it in a justice's court to recover the value of the contents of the package. The justice rendered a judgment for the defendant, and, on appeal to a jury in the justice's court, a verdict was returned for the plaintiffs for the proved value of the contents of the package—\$46.20, with interest. The case was taken by certiorari to the superior court, which, on the hearing, sustained the certiorari, and set aside the verdict and the judgment rendered thereon, and entered up a final judgment in favor of the express company; and to this the plaintiffs excepted.

On the trial in the justice's court the plaintiffs proved the contract of shipment made with the express company, and the delivery to it of the package containing the 145 articles specified, to be transported to Chattanooga and there delivered to the Radius Jewelry Company, and the value of the contents of the package, and proved that the package was lost while in the possession of the express company. Indeed, there was no substantial controversy on the evidence, and it would seem that the verdict in behalf of the plaintiffs was demanded. Counsel for the express company submits to this court four legal reasons, covered by the petition for certiorari, in support of the contention that the verdict against the express company was contrary to law: (1) That the justice's court had no jurisdiction of the subject-matter of the suit, the same sounding in trover, and not in contract; (2) that, the proposition involved being solely one of law, the magistrate, on the hearing of the appeal in the justice's court, should have directed a verdict in favor of the defendant; (3) that, the freight charge of 25 cents never having been paid, the verdict for the full amount of the goods, to wit, \$46.20, was without evidence to support it; (4) that, this being a shipment of jewelry, and the nature of the shipment not being disclosed to the express company, and it being offered through the ordinary freight channels instead of the money

department, the shippers committed a constructive fraud upon the Southern Express Company, which would prevent them from recovering.

We do not know upon which one of these grounds the learned judge of the superior court sustained the certiorari and entered up final judgment in favor of the express company. It is stated in the argument, and in the brief of counsel submitted to this court, that he did so on the ground that the suit was *ex delicto*, and the justice's court was without jurisdiction. The judgment of the superior court, however, is general, and, if for any reason it is right, it should be affirmed without reference to the ground upon which it was based. We can not agree with the judge of the superior court in his conclusion, upon any ground that we have been able to find in the record. On the contrary, we are clear that under the undisputed evidence and the well-established principles of law applicable thereto, the Southern Express Company was liable to the plaintiffs for the value of the contents of the package, and that the verdict in their favor was right. Indeed, the reasons in support of the judgment of the superior court are, in our opinion, so manifestly without merit as hardly to justify any extended consideration. But, since they are made and earnestly insisted upon, we will briefly consider them.

1. It is well settled that in a justice's court technical pleading is not required. In the present case, however, the plaintiffs, by formal petition, set forth their cause of action. An examination of this petition shows that in form and substance it is a suit on a contract, alleging a breach of that contract, and suing for the value of the goods which were to be delivered by the defendant under the contract, and which were lost to the plaintiffs by reason of the defendant's breach of contract, and that the plaintiffs expressly waive any tort. The only ground upon which the defendant supports its view that the case was one *ex delicto* is the allegation in the petition that the defendant "failed, neglected, and refused to deliver said package to the consignee as aforesaid, and has likewise failed and refused to pay the value thereof to plaintiffs, although often requested so to do." It is insisted that this is a direct charge of a conversion of the property intrusted to the Southern Express Company, and therefore that the suit was in the nature of *trover*. We do not agree with this construction of

this part of the petition. The language used is, in our opinion, clearly susceptible of the construction that it charges a breach of contract. If there was any doubt as to the construction of the petition, it was the duty of the justice's court to adopt the construction which would hold the action and not defeat it. This rule applies especially to suits in a justice's court, and especially where the question of jurisdiction is not raised by demurrer. *Payton v. Gulf Line Ry. Co.*, 4 Ga. App. 762 (62 S. E. 469); *Central Railroad Co. v. Pickett*, 87 Ga. 734 (13 S. E. 750). But we think this suit is so clearly one arising ex contractu that there is no reason why this rule of construction should be invoked. The plaintiffs in their petition set forth the contract, charge a breach thereof, allege the value of the goods and the refusal to pay, distinctly declare their purpose to waive any tort and to sue on the contract, and, under the express provision of the constitution of this State (article 6, § 7, par. 2), the justice's court had jurisdiction of the amount claimed; it not exceeding \$100. *Southern Express Co. v. Hilton*, 94 Ga. 450 (20 S. E. 126); *Bates v. Bigby*, 123 Ga. 729 (51 S. E. 717); *Southern Express Co. v. Briggs*, 1 Ga. App. 300 (57 S. E. 1066); *Jenkins v. Seaboard Air-Line Ry.*, 3 Ga. App. 381 (59 S. E. 1120); *Southern Ry. Co. v. Maddox*, 7 Ga. App. 650 (67 S. E. 838).

2. The second reason asserted in support of the soundness of the judgment of the superior court is, that, the proposition involved being solely one of law, the magistrate should have directed a verdict when the case was appealed to a jury in the justice's court. We do not know of any law which would authorize a magistrate to direct a verdict in a justice's court. But, if there were such a rule of law, we are certain that if the magistrate had directed a verdict for the defendant in this case, under the admitted facts, it would have been a gross abuse of his discretion, as, in our opinion, the undisputed facts demanded a verdict for the plaintiffs.

3. The contention that the verdict for \$46.20 was too large and was without any evidence to support it, because the defendant was entitled to at least a deduction from this amount of 25 cents due to it as freight charges, is without any merit. If it were meritorious, the amount of 25 cents could be directed to be written off from the amount of the judgment. But we are somewhat at a loss to understand why the express company should have been entitled to its

freight charges when the evidence showed that it had failed to perform its contract of transportation. The package was lost, and not delivered in a partially damaged condition. It was totally lost, presumptively by the negligence of the company, and the presumption was not conclusively met. It would be a remarkable proposition of law that, under these facts, the plaintiffs would not be entitled to recover the proved value of their property which had been lost by such negligence, because they had failed to pay the freight charges. *Wilensky v. Central Ry. Co.*, 136 Ga. 889 (72 S. E. 418), and cases cited. Besides, this question of freight charges was not raised in the justice's court on the trial, and could not properly have been raised in the superior court or this court. Civil Code (1910), § 5199; *Perry v. Brunswick & Western R. Co.*, 119 Ga. 819 (47 S. E. 172); *Callaway v. Atlanta*, 6 Ga. App. 354 (64 S. E. 1105).

4. It is insisted in the fourth ground that the plaintiffs could not recover, because, in shipping the package in the ordinary freight department and not in the money department, and in not disclosing its contents to the express company, they were guilty of constructive fraud upon the express company. Under the facts of this case, we do not think that the plaintiffs perpetrated upon the express company any fraud, actual or constructive. What are the facts? The plaintiffs, who were merchants in Atlanta, were in the habit of frequently shipping articles of merchandise through the express company, and for this purpose used the printed blank receipt generally in use by the customers of the express company. The package in this case was sent to the express company by a colored porter. It was an ordinary pasteboard shoe box, wrapped in heavy brown paper, securely fastened with a string, and marked: "Radius Jewelry Company, 722 Market Street, Chattanooga, Tennessee." The receipt to be signed by the company was, according to the general custom among the merchants of the city, prepared by the plaintiffs. The agent of the defendant signed this receipt and delivered it to the plaintiffs' agent, with the freight charge, 25 cents, entered thereon, and with the following additional entry stamped thereon with a rubber stamp: "Value asked, but not given. Accepted at owner's risk of breakage. Accepted as merchandise only. No money, jewelry, or valuables." The package contained 145 articles of merchandise or novelty goods, the same

class of goods that are sold by dry-goods stores, retail hardware stores, ten-cent stores, drug stores, cigar and soda-water stores. The receipt limited the liability of the express company, in case of loss or damage to \$50. The value of the goods shipped in this case was claimed to be \$46.20, and proved to be of that value. The defendant knew the character of novelties or merchandise that the plaintiffs were dealing in. It accepted this package as merchandise, and made the minimum charge of .25 cents for it as merchandise, and the limit of its liability for merchandise, where the value is not stated, is \$50. Whether the package contained jewelry in the technical sense, or whether it contained merchandise, the express company could in no event have been liable for more than \$50. This fact was known to the shippers. Nothing was said or done by the plaintiffs to deceive the express company as to the contents of the package, and no effort is made by the shippers to recover more for the property than if the property had been in fact merchandise. It seems to us, therefore, that the question of whether the contents of the package were in fact jewelry or merchandise was immaterial. The plaintiffs are endeavoring to recover for it, not as valuable jewelry, but simply as merchandise. The facts of this case do not bring it within the principles decided in *Southern Express Co. v. Pope*, 5 Ga. App. 689 (63 S. E. 809). In that case it was represented to the express company at the time of the shipment that the package was of the value of \$5, and on this amount the express charge of 25 cents was paid. The shipper afterwards claimed that the package contained a valuable pearl pendant worth \$150, and sought to recover the value of this pearl from the express company. The shipper having endeavored to conceal the true value of the contents of the package, this court held that such fraud was perpetrated upon the express company as would preclude a recovery of the value of the pearl, and that this fraud absolutely voided the contract. Besides, it does not appear from the evidence in this case that the package shipped as merchandise was anything else than merchandise. There were 145 articles. The aggregate value was \$46.20. The articles, according to the evidence, were combs, purses, plated rings, Ingersoll watches, barlow knives, goods such as are sold by dry-goods stores, retail hardware stores, drug stores, and the like. We think it was fairly open to

question whether these articles were jewelry in the ordinary acceptance of that term; and we think they were in fact merchandise.

Articles of jewelry have been generally defined by the courts to be such articles as are made of precious metal, silver, gold, diamonds, sapphires, rubies, pearls, etc. 4 Words & Phrases, p. 3811.

Fraud must never be presumed. It must be proved. Civil Code (1910), § 4626. And while we do not think that under the undisputed facts of this case any fraud, either actual or constructive, was perpetrated on the express company by the shippers, certainly the most that could be claimed by the express company was that the evidence as to fraud was in conflict; and, as the question was squarely made and decided by the jury on the trial, the issue was settled by the verdict. To sum up the case, we find no error of law, material or technical, in the case as presented to the superior court on certiorari, and the verdict in behalf of the plaintiffs, under the undisputed evidence, was demanded.

For these reasons, the judgment of the superior court in sustaining the certiorari and entering final judgment in favor of the express company was contrary to law. *Judgment reversed.*

3237. HEARD *et al.*, executors, for use, etc., *v.* CAMP.

The amendment did not set forth a new cause of action, but merely corrected and amplified one phase of the case as previously pleaded, and therefore the court erred in disallowing it.

DECIDED DECEMBER 19, 1911.

Action for damages; from city court of Floyd county—Judge Reece. December 30, 1910.

The Fidelity & Casualty Company insured for the owner the plate-glass windows in a building described in the policy as "premises Nos. 7, 9, 11, 13, Second avenue, city of Rome, and State of Georgia, occupied as office building." The policy provided that the insurer should be subrogated to all the rights of the owner against any person causing damage or loss to the property covered thereby. A window in the building was broken, and was replaced by the insurance company, and suit was then instituted in the name of the owner, for the use of the insurance company, the plaintiff alleging that the defendant had negligently broken the window. The

petition described the window broken as being in No. 11 Second avenue. At the trial the evidence tended to show that the window broken was in No. 9 Second avenue; whereupon the plaintiff offered to amend the petition by striking the words "No. 11" from the petition and describing the window as follows: "Said plate-glass window being located in the room in said W. J. West Office Building which, at the time said glass was broken, was occupied by the Rome Industrial Life Insurance Company; said W. J. West Office Building being designated as Nos. 7, 9, 11, 13, Second avenue, at the time said glass was broken." The refusal to allow the amendment is assigned as error.

Maddox & Doyal, for plaintiffs.

M. B. Eubanks, for defendant.

RUSSELL, J. It is insisted that the amendment sought to set up a new and distinct cause of action. The cause of action was the damage caused through the negligence of the defendant in breaking a window in the office building covered by the policy of insurance. The negligence alleged was that the defendant threw an iron horseshoe at a dog, and thus broke the window. In our opinion the amendment did not change the cause of action, but merely described more accurately and more in detail the window which was broken in the same building. If the missile had hit a man and broken his rib, and the petition had alleged that the rib broken was on his left side, it would hardly be contended that an amendment changing it to the right side would be the assertion of a new cause of action. How, then, can the substitution of another window in the same building, owned by the same person and covered by the same policy, be said to be the substitution of a new cause of action? The designation of the broken glass by the wrong number was a clerical error, and the amendment merely sought to correct the error. Civil Code (1910), § 5682; *Lanier v. Kelly*, 6 Ga. App. 738 (65 S. E. 692); *Wall v. Schwarz*, 9 Ga. App. 845 (72 S. E. 434).

This material error rendered subsequent proceedings nugatory, and requires a reversal of the judgment; and therefore it is unnecessary to consider the assignments of error based on the sustaining of the motion to nonsuit.

Judgment reversed.

3239. ALLEN *v.* WINDHAM.

HILL, C. J. An affidavit of illegality was filed to the levy of an execution issued on a judgment rendered on a bond for the dissolution of a garnishment, on the alleged ground that the summons of garnishment was issued by the clerk of the superior court, who was not authorized to issue summons of garnishment. The recitals contained in the bill of exceptions show that the affidavit for garnishment was made before a justice of the peace, and the summons of garnishment was duly issued by him, and the garnishment proceedings were in all respects regular, and these admissions in the bill of exceptions are corroborated by the record of the garnishment proceedings, specified as a part of the record and transmitted to this court. The judgment dismissing the affidavit of illegality is affirmed. *Judgment affirmed.*

DECIDED DECEMBER 19, 1911.

Affidavit of illegality; from city court of Ashburn—Judge Tipton. January 16, 1911.

J. J. Story, W. A. Hawkins, for plaintiff in error.

James H. Pate, contra.

3246. LOUISVILLE & NASHVILLE RAILROAD CO. *et al.*
v. HUDSON.

1. A railroad company is not liable in damages for a homicide committed by an employee, where the homicide was not committed in the prosecution of its business and within the scope of his employment, but was his personal act in resenting a real or fancied insult.
2. Where the act of the employee in committing the homicide was one for which the master was not responsible, because it was an individual personal act of the employee, not within the scope of his employment, the fact that the employee was of high and ungovernable temper and habitually carried a pistol would be wholly immaterial and irrelevant. The test for determining a master's liability for an act of the servant is not the servant's bad disposition or vicious habits, but whether the act was within the scope of his employment and was connected with the prosecution of the master's business.

DECIDED DECEMBER 19, 1911.

Action for damages; from city court of Richmond county—Judge W. F. Eve. February 9, 1911.

Hudson was a night yard-conductor of the Charleston & Western Carolina Railway Company, whose duty it was, among others, to receive cars delivered by a connecting carrier to the railroad. Jackson was a night engineer, employed by the defendant railroad companies, to wit, the Louisville & Nashville Railroad Company

and the Atlantic Coast Line Railroad Company, as lessees, and it was his duty among others, to deliver the cars of his employer to the Charleston & Western Carolina Railway Company. On November 1, 1909, at night, Jackson, in the discharge of his duties, delivered 23 cars to the last-named company in its yards in Richmond county. When Jackson and his crew reached the yards for the purpose of making a delivery of these cars, he asked Hudson where he wanted the cars placed, and Hudson replied, "On track No. 1." When Jackson called the switchman on that track, Hudson signaled Jackson to stop, whereupon the conductor who was with Jackson and his crew signaled Jackson to go ahead, and Jackson endeavored to move the line of cars. He could not move them, and, seeing that he could not do so, requested his fireman to get down and help him find out the trouble, and both Jackson and his fireman got down off the engine, and began to inspect and examine the cars for the purpose of finding out the trouble. They claimed that the air was "cut out," and Jackson accused Hudson of cutting it out. Hudson replied that he knew nothing of it, and that, if Jackson said that he did it, he lied. Immediately Jackson jumped on his engine, got a revolver out of his box, and wrongfully, willfully, and unlawfully shot Hudson, killing him almost instantly.

Suit was brought to recover for this homicide, on two grounds: (1) That Jackson, in committing the homicide, was acting within the scope of his duty as the agent of his employer, the railroad company, and that the act was committed by him while he was in the actual performance of and in connection with the discharge of his duties as such employee, and therefore that the defendants were responsible for this tort of their agent; and (2) that Jackson was an unfit and improper person to act as an engineer; that he habitually carried a pistol while on duty, had an ungovernable temper, and was an incompetent man to discharge the work of an engineer, was a dangerous man, who was apt to use his pistol without provocation or justification, and did use it many times while in the employ of the defendants, and these facts were fully known to the defendants who, notwithstanding, employed him and continued to keep him in their employment. A general demurrer filed to the petition was overruled, and the case came to this court on exception to that judgment.

Joseph B. & Bryan Cumming, J. M. Hull Jr., for plaintiffs in error.

A. L. Franklin, contra.

HILL, C. J. (After stating the foregoing facts.) The courts generally have found some difficulty in holding the master liable for a homicide intentionally committed by his servant, in the absence of any express command on the part of the master, and the majority of adjudications seem to favor the theory that in the absence of express authority the master is not liable in damages for a deliberate, intentional, and wilful homicide committed by his servant. 1 Thomp. Neg. § 571. But, whatever may be the adjudications in other jurisdictions on this subject, it is settled by the statute law of this State that the master would be liable where the homicide was committed by the servant in the prosecution and within the scope of the master's business, whether it was actually committed by the command of the master, or was the result of negligence on the part of the servant, or his voluntary act.

The Civil Code, § 4413, provides that every person shall be liable for torts committed by his servants by command, or in the prosecution or within the scope of his business, whether the same be by negligence, or voluntary. And section 2780 declares that a railroad company shall be liable for damage done by any person in the employment or service of such company, unless the company shall make it appear that their agents were in the exercise of reasonable care and diligence, the presumption in all cases being against the company. A corporation, under the law, is a "person," in the meaning of the first section quoted; and the terms of the section apply to corporations as well as to natural persons, and the principle of law there announced is well settled by the adjudications of the courts. The difficulty is in the application of the general principle of law to the particular facts. In the great multitude of decisions made by the courts, applying the facts of the cases to the principle of law just announced, there is found much diversity of opinion and room for doubt; and, after all, the solution of the question is to be determined largely by the facts of each particular case, aided by the very best judgment of the court in making the application of the principle to those facts.

The master is not an insurer against wrongs perpetrated by his servants. It would be unjust to hold him responsible for these

wrongs, unless they were done by the servant while he was in the performance of the master's business and was acting within the scope of his employment. The rule of liability in the case is based upon the old maxim, "Qui facit per alium facit per se," and if the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, and the act is not properly within the scope of his employment, it can not be said that the master does the act by his servant. Mr. Thompson, in his work on Negligence (section 526), lays down the test by which to determine whether a servant acts within the scope of his employment. "The test is not that the act of the servant was done during the existence of the employment,—that is to say, during the time covered by the employment,—but whether it was done in the prosecution of the master's business; whether the servant was at that time engaged in serving his master; for, if the servant steps aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and the servant alone is responsible for his act committed by him during this period." In the case of *Savannah Electric Co. v. Hodges*, 6 Ga. App. 470 (65 S. E. 322), Judge Russell, speaking for this court, quoted approvingly the foregoing test of liability of the master for the servant's act, and held that "if the servant steps aside from his master's business, for however short a time, to do an act entirely disconnected from it, and injury results to another from such independent voluntary act, the servant may be liable, but the master is not liable."

The decision of this court in the case just cited would seem to control the case now under adjudication, for the facts of the two cases are not so different as to afford substantial room for any different application of the rule of law. The question here to be decided, under this rule of law, is whether the killing of Hudson by Jackson was done by Jackson in the prosecution or furtherance of his employer's business, or whether in the killing Jackson turned aside from his master's business and committed an act wholly disconnected therefrom, and for the consequences of which he, and not his master, would be liable. While repeated adjudications in analogous cases leave the solution of this question not entirely free from doubt, still it seems to us, restricting our view to the facts

of this transaction, and not looking beyond, or permitting ourselves to become perplexed in the maze of contradictory rulings, that we should adopt, as the most reasonable conclusion, the view that when Jackson committed this homicide he had turned aside for that purpose from his master's business and was engaged in his own personal matter. Jackson made against Hudson, an implied accusation of improper conduct. Hudson resented this accusation by in effect denouncing Jackson as a liar, and Jackson immediately ran to his box on the engine, secured his pistol, and instantly shot and killed Hudson. He shot Hudson, because Hudson called him a liar. It was to resent what he deemed a personal insult. He did not shoot and kill Hudson because in his opinion Hudson had been guilty of cutting off the air-brakes and thus interrupting him in the proper discharge of his official work; and, even if he had done this, it is not clear that the master would have been liable. The killing was due solely to an insulting epithet used by Hudson. Jackson was acting for his master in delivering the cars to the Charleston & Western Carolina Railway Company, and if Hudson had interfered with this work, and Jackson had resented such interference, and made an assault and battery, or killed Hudson for such interference, it might be claimed that the tort was committed by Jackson in connection with his master's business; but it can not be doubted that the killing of Hudson was due solely to the insulting epithet, and that but for it the homicide would not have occurred. If the truth of this proposition is not sufficiently apparent from the mere statement of the facts, we are sure it can not be rendered any more manifest by argument, or by citation of authority. We therefore do not deem it profitable to extend the discussion on this point. See *Henderson v. Dade Coal Co.*, 100 Ga. 568 (28 S. E. 251, 40 L. R. A. 95).

The cases relied upon by counsel for the defendant in error—*Savannah Electric Co. v. Wheeler*, 128 Ga. 550 (58 S. E. 38, 10 L. R. A. (N. S.) 1176), and *Mason v. Nashville, Chattanooga & St. Louis Ry.*, 135 Ga. 741 (70 S. E. 225, 33 L. R. A. (N. S.) 280)—are distinguishable by their facts from the present case. Both of these were cases of passengers, where the rule of extraordinary diligence applies, and the master is under a duty through his agents of personally protecting the passenger from any insult, either by one of his own employees or by third persons. In the

Wheeler case the conductor drew a pistol and fired at a passenger, missing the passenger and killing an innocent woman passing on a public street through which the car was running, because the passenger had asked the conductor for his change. The Supreme Court held that this tort of the conductor was within the scope of his business in collecting fares. In the *Mason* case the passenger was drunk and disorderly, and used foul and abusive language to the conductor, which brought on a difficulty, and the conductor was in the discharge of his duty in attempting to eject the disorderly passenger. The case was decided in favor of the company by the lower court, and the Supreme Court granted a new trial on a ground not involving the question in the present record. Mr. Justice Lumpkin, in the opinion in the *Mason* case, reviews many previous decisions of the Supreme Court relating to the liability of railroad companies for the conduct of their employees, and modifies to some extent the rulings previously made, but there is nothing in the opinion in support of the proposition that the master in the present case was liable for the act of the engineer in killing the decedent.

If the act of the engineer in the present case was, as we have held, his personal act, and not one for which the master was responsible, it would be wholly immaterial, on the question of the master's liability, whether the servant was of ungovernable temper, or habitually carried a pistol while on duty. If the master was liable because the act was performed by the servant within the scope of his employment, the employee's temper or unfitness, and the fact that he carried a pistol with the master's knowledge, might be circumstances to be considered on the question of exemplary or punitive damages; but these facts of themselves can not make the master liable for an act done by his servant outside the scope of his employment and for which the master is not otherwise responsible. In other words, we do not think that the fitness, or the temperament or disposition, of the employee, and his private habits, are material facts to be considered, except on the question of aggravation, where the master is otherwise liable for the act of the servant.

For the foregoing reasons, we think the demurrer to the petition should have been sustained by the lower court.

Judgment reversed.

3255. CUNNARD v. CHILDS.

RUSSELL, J. A defendant who has been served and who has had her day in court can not go behind the judgment by affidavit of illegality, for the purpose of showing that she was surety on the note which is the basis of the judgment, and that she is released because of conduct of the creditor prior to the rendition of the judgment. Civil Code (1910), § 5311; *Bird v. Burgsteiner*, 108 Ga. 654 (34 S. E. 183); *Steele v. Atlanta Co.*, 91 Ga. 64 (16 S. E. 257).

Judgment affirmed.

DECIDED DECEMBER 19, 1911.

Affidavit of illegality; from city court of Covington—Judge Whaley. February 10, 1911.

A. S. Thurman, for plaintiff in error.

R. W. Milner, contra.

3248. COLEMAN v. MULLIS.

- RUSSELL, J. 1. There was no error in overruling the motion to dismiss because of the alleged defects in the process.
2. The answer being insufficient in law to constitute a defense to the note sued on, there was no error in striking it and rendering judgment in favor of the plaintiff.

Judgment affirmed.

DECIDED DECEMBER 19, 1911.

Complaint; from city court of Eastman—Judge Griffin. January 24, 1911.

J. A. Neese, for plaintiff in error.

W. M. Clements, contra.

3261. BUTLER v. ATLANTA BUGGY CO.

It appearing, from the evidence in behalf of the plaintiff, that, even conceding that his employer was guilty of negligence, as alleged in the petition, in furnishing him a defective instrumentality with which to do his work, his opportunities of discovering this defective condition were equal if not superior to those of the employer, and that this defective condition was patent to superficial observation, and was in fact observed by the plaintiff before he was injured by his voluntary use of the defective instrumentality, a nonsuit was properly granted.

DECIDED DECEMBER 19, 1911.

Action for damages; from city court of Atlanta—Judge Reid. November 29, 1910.

Butler sued the Atlanta Buggy Company for damages on account of personal injuries. The court overruled a demurrer to the petition, and, after the introduction of testimony for the plaintiff, granted a nonsuit; and the latter judgment is here for review. The allegations of the petition are in substance as follows: Butler was an employee of the defendant as a woodworker, and had been so employed for over two years, and while he was at work endeavoring to saw a piece of wood with a rip or buzz saw furnished him by the defendant for that purpose, his left hand was jerked against the saw, and two of his fingers were cut off, and he was otherwise injured. He alleges that the saw was not in a proper condition to be used, because several of the teeth were improperly set; that is, some of the teeth were bent more than the others. This defective condition caused the plank that he was pushing against the revolving saw to jerk back, and, when these imperfect teeth came against the plank, his hand was jerked against the saw. He did not know of the defective condition of the saw, and had no opportunity of discovering its defective condition before he used it, and he was not guilty of negligence in attempting to use it in this condition. The defendant had an employee whose duty it was to keep this saw in proper condition, and this duty had not been discharged, and an inspection by the defendant through this employee would have discovered this defective condition of the saw. It is alleged that the employer was negligent in failing to furnish the plaintiff with proper machinery with which to work; that in its improper and defective condition the saw was not a safe instrument for him to use at his work.

The plaintiff proved his employment, the nature of his work, and that several of the teeth of the saw he was using were set out more than the other teeth; that the defendant kept an employee whose duty it was to keep the machine and tools in proper condition, and that while the plaintiff was attempting to use the saw, being ignorant of its defective condition, his hand was thrown against the saw; that at the time he received the injuries he was pushing a piece of plank about 18 or 20 inches long, 5 or 6 inches wide, and three fourths of an inch in thickness, against the revolving saw, for the purpose of having it cut or ripped; that the plank lacked only

about 5 inches of being sawed or ripped through, and while he was pushing the timber against the saw the piece of timber would rise up and not go through, and it became necessary for him to put his hand around the saw to hold down the timber; that, just as he got the plank or piece of timber almost cut through, the saw raised or jerked the plank, and his hand was thus thrown against the saw and injured; that he was sawing the plank in the usual and proper way, and the reason the plank rode the saw and jerked his hand against it was "because one of the teeth of the saw, that was bent too far out, instead of going through the slot which had been sawed in the plank, struck the plank by the side of the slot," thus raising the plank up and throwing his hand against the saw. The saw was about 12 inches in diameter, and revolved towards the plank where the timber was pushed against it. It was set in a table having a steel top, and almost a half of the saw revolved above the surface of the table. The timber to be sawed was pushed along the surface of the table to the saw.

The plaintiff himself testified that he had been working as an employee of the defendant for about two years, and that in connection with this work he made constant use of the saw in question; that he was an experienced workman; that he did not notice the condition of the saw on the day of his injury, and was doing his work that day in the proper and usual way; that it was necessary for him to put his hand in front of the saw to hold the plank down, as it flew up, in order to get it through the saw; that it was a piece of hard oak timber; that he was using a guide or gauge for the purpose of having a straight line sawed, and that a guide would keep the line straight if it was a good one, but this guide "would just wobble about;" that it was not of any account, and this made crooked the line he was endeavoring to saw; that he saw the guide "wobble;" that there was no way to tighten it, and that he went on and did the best he could with the "wobbly guide," because he had not noticed its imperfect condition until after he had started sawing the plank; that he saw that one of the teeth was bent too far out, but could not tell upon which side of the saw the bent tooth was; that he discovered the condition of the saw on that day, and before he was injured, and he had not seen the saw since that day. A fellow workman, who testified in behalf of the plaintiff, described the manner in which the

plaintiff's injuries were received, about as detailed by the plaintiff, and testified as to the condition of the teeth of the saw, stating that he did not give the saw a close examination, but "just glanced at it, and saw that the teeth were irregular;" that he made a further examination of it after the injury occurred, and "it was in about as good condition as they generally ran it."

Moore & Branch, for plaintiff.

Smith, Hammond & Smith, for defendant.

HILL, C. J. (After stating the foregoing facts.) The evidence, even when considered most favorably for the plaintiff, fails to show that he successfully carried the burden which the law imposed upon him. It was incumbent upon him to prove, not only that the defendant was guilty of negligence as alleged in the petition, but that he himself was free from fault. The evidence leaves it doubtful whether the plaintiff's injuries resulted in fact from the defective condition of the saw as described. His fellow servant, who testified as to the condition of the saw, said that "it was in about as good condition as they generally ran it." If this was true, its defective condition could not have furnished a basis of liability on the part of the defendant, in view of the fact that the plaintiff was an experienced workman, and had been for over two years familiar with the saw as it was generally used by him in his work. But, even conceding that the saw was in a defective condition, and that it was the duty of the defendant to have had it inspected and to have remedied these defects, yet these things alone would not have entitled the plaintiff to recover. The law raises an implied warranty on the part of the master that he will keep and maintain the instrumentalities with which his employees are required to work free from any hidden defects, so far as he knows or in the exercise of ordinary diligence can anticipate or discover. It also implies an agreement on the part of the servant to assume the risk of all dangers that are within his knowledge, or can be discovered by him in the exercise of ordinary diligence on his part. The obligation is mutual. The degree of diligence is the same, and, before a recovery can be had, the servant must show that the master violated his implied obligations, while he himself fully performed the obligation which the law imposed upon him. This principle is well settled and is universal, and this court, as well as the Supreme Court of Georgia, has made many decisions emphasizing the rule

of mutual obligation which the law imposes upon both the employer and the employee. Some of these decisions pertinent to the facts of the case sub judice are *Brown v. Rome Foundry Co.*, 5 Ga. App. 143 (62 S. E. 720); *Attleton v. Bibb Manufacturing Co.*, 5 Ga. App. 777 (63 S. E. 918); *Flury v. Hightower Box & Tank Co.*, 132 Ga. 300 (64 S. E. 72); *Hendrix v. Vale Royal Mfg. Co.*, 134 Ga. 712 (68 S. E. 483); *White v. Kennon*, 83 Ga. 343 (9 S. E. 1082); *Ingram v. Hilton & Dodge Lumber Co.*, 108 Ga. 197 (33 S. E. 961); *Smalls v. Southern Ry. Co.*, 115 Ga. 137 (41 S. E. 492); *Manchester Mfg. Co. v. Pope*, 115 Ga. 542 (41 S. E. 1015); *DeLay v. Southern Ry. Co.*, 115 Ga. 934 (42 S. E. 218); *Worlds v. Georgia R. Co.*, 99 Ga. 283 (25 S. E. 646); *Zipperer v. S. A. L. Ry.*, 129 Ga. 387 (58 S. E. 872).

The whole law on the subject, however, is comprehensively and clearly stated in the two sections of the Civil Code of this State. Section 3130 of the Civil Code (1910) declares: "The master is bound to exercise ordinary care . . . in furnishing machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. If there are latent defects in the machinery, or dangers incident to an employment, unknown to the servant, of which the master knows or ought to know, he must give the servant warning in respect thereto." Section 3131 declares: "A servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. In suits for injuries arising from the negligence of the master in failing to comply with the duties imposed by the preceding section, it must appear that the master knew or ought to have known . . . of the defects or danger in the machinery supplied; and it must also appear that the servant injured did not know and had not equal means of knowing such fact, and by the exercise of ordinary care could not have known thereof." When we apply these sections of the code, which simply embody well-settled principles of law, to the facts proved by the plaintiff, even conceding that the master may have been negligent in furnishing to him a defective saw with which to do his work, it is perfectly obvious that this defective condition was either actually or constructively known to the plaintiff. His own witness testified that he discovered the defective condition by a mere glance at the saw. The plaintiff was an experienced work-

man. He had worked with this identical saw repeatedly. He had been working with it that very day. According to his testimony he did actually notice that it "wobbled" and was not proceeding in its normal way. If his coemployee, by a glance, discovered that its teeth were deflected from their normal position, could not the plaintiff, when he was about to use it, and was actually using it, also have seen its defective condition, which he described, and which he says caused his injuries? Indeed, he must have seen it, because he fully described its condition, and testified that he did not see the saw for months after his injuries. His own evidence affirmatively shows that he not only had an equal opportunity with the master to discover the defective condition of the saw, but had a better opportunity than the master to make this discovery.

Learned counsel for the plaintiff insists that, as a general demurrer had been overruled, his right to recover, if he proved the allegations of his petition, was settled. But did he prove the allegations of his petition? The principal allegations of his petition, on proof of which alone he was entitled to recover, were that the saw was defective, that its defective condition was unknown to him, and that this condition could not have been known to him by the exercise of ordinary diligence and care. It was necessary for him to show these things, even after he had proved that the master was guilty of negligence in furnishing him a defective tool with which to work. But the evidence in his behalf utterly fails to show this. A faithful employee, who is injured in the zealous service of his master, is entitled to compensation for any injuries that he may receive, caused by his master's negligence, and which could not have been avoided by him in the exercise of ordinary care and prudence; and this court will not be diligent to detect the negligence of a faithful and zealous servant. But where that rule of justice, to wit, the rule of mutual obligation, is clearly violated by the failure of the servant, either through recklessness or negligence, to avail himself of his senses, aided by his experience, in discovering defects in the instrumentalities with which he is working, and which are discoverable even by a glance of the eye, and can not possibly be hidden from the view of any one who looks at the instrumentality in the light of day, the zeal and fidelity of the servant is not sufficient to overcome such manifest negligence. A careful study of the evidence for the plaintiff, giving to it every

reasonable inference that would support his claim to recover damages, leads us to the conclusion that the question of his negligence, under well-settled principles of law, was not even issuable, and the judge properly awarded a nonsuit. *Judgment affirmed.*

3263. CALHOUN BRICK CO. v. PATTILLO LUMBER CO.

1. The recording of a materialman's claim of lien on the proper book in the office of the clerk of the superior court in the county where the property upon which the lien is claimed is situated, within three months after the material is furnished, substantially in the form prescribed by the statute, is a sufficient record, although the entry of filing and recording, and the actual inscribing of the claim of lien, may have been done by an employee of the clerk, charged specially with such clerical work in the office. It is the fact of record, and not the mere ministerial or mechanical act of recording that is essential.
2. A claim of lien for material furnished for building purposes from time to time under one and the same contract is recorded in time, if the record of the claim be made within three months from the delivery of the last item constituting a part of the running account covered by the contract, although many items of the account had been furnished more than three months from the date of record.

DECIDED DECEMBER 19, 1911.

Money rule; from city court of Atlanta—Judge Reid. January 31, 1911.

Thomas & King, for plaintiff in error.

E. A. Stephens, Walter McElreath, contra.

HILL, C. J. The questions in this case arose on a rule against the sheriff for distribution of a fund in his hands, realized from the sale of property under execution. There were two claimants of the fund,—the Pattillo Lumber Company claiming it under a materialman's lien, and the Calhoun Brick Company under a general execution. The judge, by agreement, heard the case without the intervention of a jury, and decided that the materialman's lien had priority.

It is admitted that if the materialman's lien was valid, it was entitled to priority of payment, and there was no contention that this claim of lien was not in due form, or that it was not recorded in the proper office on the proper book. But its validity is challenged on two grounds: (1) Because the entry of filing and recording was not made by the clerk of the superior court, but was

made by a clerk employed in his office and not in his presence; that the entry of filing and recording, as well as the recording of the claim of lien, was made by this employee, he writing the name of the clerk; that this clerk was employed in the office of the clerk of the superior court in doing the actual work of writing on the books of the clerk's office. (2) That the claim of lien was not filed for record in the office of the clerk, or recorded, within three months after the material had been furnished. The evidence showed that some of the material for which the lien was claimed was furnished within three months before the filing for record of the claim of lien, but it was insisted this material was not included in the material furnished in the original contract, but was extra material, ordered from time to time, and was not a part of the account, and therefore could not be included in the claim of lien. The judge found against this contention, holding that these items of the account constituted a part of the running account furnished from time to time under one and the same contract, and that the record of the claim of lien was made three months from the delivery of the material constituting several of these last items.

1. The recording of the materialman's claim of lien in the office of the clerk of the superior court in the county where such property is situated, within three months after such material is furnished, substantially in the form as designated in the statute, is legally sufficient. Civil Code (1910), § 3353, par. 2. A claim of lien must not only be filed for record, but must be recorded within three months after the material shall have been furnished, to meet the requirements of the statute. If the claim of lien is actually recorded on the proper book in the clerk's office, in so far as the record is concerned the creation of the lien is established. *Jones v. Kern*, 101 Ga. 309 (28 S. E. 850). The omission of the clerk to enter the fact of the record on the original paper, if the record was actually made, would not invalidate or affect its regularity. *Grice v. Haskins*, 73 Ga. 701. In other words, it is the fact that the claim is duly recorded in the proper office and on the proper book that is necessary, and it is immaterial whether the clerk himself, or some one in his office and in his employ, does the physical act of recording, for the writing of the lien upon the record is a mere ministerial or mechanical duty, and can be properly performed by any one employed in the office by the clerk who is charged with

the duty of making such recordation. The act of recording does not require the exercise of any judgment or discretion on the part of the clerk. It is purely a mechanical or executive act, and can be delegated by the clerk to an employee in his office, unless this is expressly prohibited by statute. Mechem on Public Officers, § 567; *Horton v. State*, 120 Ga. 307 (47 S. E. 969). The decisions relied upon by counsel for the plaintiff in error relate to cases involving some act which the statute expressly requires shall be performed by the officer in person, or which necessitates the exercise of some judgment or discretion, or to cases referring to the signing of something in the nature of judicial writs, such as the issuance of subpoenas, or executions, and official documents of like character. We think, therefore, that the learned trial judge very properly held that the claim of lien was valid, notwithstanding the fact that the entry of filing and recording had been made by an employee in the clerk's office who was specially charged with that work; the claim of lien having been duly recorded in the proper office on the proper book.

2. The second objection to the validity of the lien involves a question of fact, largely to be determined by an inspection of the items of the account, and there was ample evidence to sustain the finding on this point. The documentary evidence clearly showed that the claim of lien was recorded within three months from the delivery of some of the items of the material which constituted as a whole the claim of lien, and it is well settled that, if the recording was within three months from the delivery of the last item of the material constituting the lien, this requirement of the statute would be fulfilled. Alexander's Lien Laws of the Southeastern States, and cases cited on page 188. *Judgment affirmed.*

3274. FLETCHER v. YOUNG *et al.*, administrators.

1. The execution of a promissory note is evidence of a full settlement of all debts up to the date thereof, except such as are specially excepted at the time; and where the maker sues the payee for a debt alleged to have been due before the execution of the note, the giving of the note to the payee is presumptive evidence that he had paid the debt to the maker before or when the note was executed. This presumption can be rebutted.

2. The admission of secondary evidence is generally not ground for reversal, where otherwise there is sufficient legal evidence in proof of the fact to which the secondary evidence relates.
3. Where the plea of payment is filed, and there is evidence to support the plea, it is not erroneous to charge, in effect, that if the jury believe, from the evidence, that the defendant in fact paid the debt to the plaintiff, the time and place when and where he paid it are immaterial. Evidence of the time and place of payment might add probative value to the proof relied upon to establish the plea, but the act of payment is the essential fact to be shown.
4. The evidence and inferences reasonably deducible therefrom were sufficient to raise the presumption that the debt sued for, if it ever existed, had in fact been paid by the defendant; and, no error of law appearing, the verdict in his behalf must stand.

DECIDED DECEMBER 19, 1911.

Action for contribution; from city court of Ocilla—Judge Oxford. January 28, 1911.

Fletcher brought suit against Love Young and W. W. D. Branch, as administrators of George Young, alleging that on May 15, 1902, he and George Young signed, as sureties, the note of one J. B. Harris for \$2,000; that Harris died without paying the note, and subsequently the plaintiff paid it to the Bank of Tifton, and by reason of this payment his cosurety, George Young, became indebted to him in the sum of \$1,000, with interest from the time of payment; that on December 6, 1908, George Young died without having paid him any part of the \$1,000, and this suit was for the purpose of enforcing contribution. The defendants filed an answer setting up that if any liability ever existed against their intestate, as surety upon the note sued on, the liability had been paid off and discharged by him, and that the defendants, as administrators, did not owe the plaintiff any amount whatever upon the note. In other words, they alleged that the intestate had paid to the plaintiff whatever amount he became indebted because of cosuretyship on the note, if, indeed, such indebtedness ever existed. On the trial the plaintiff proved by the cashier of the Bank of Tifton that the \$2,000 note was given by J. B. Harris, as maker, with the plaintiff, Fletcher, and the decedent, George Young, as sureties, and that Fletcher "had paid the note in full to the bank." The plaintiff testified that the original note for \$2,000 had been lost; that he had paid this original note by a renewal note to the bank, which renewal note he paid when the same became due.

In support of the plea of payment, it was shown by the defend-

ants that in October, 1906, Fletcher and George Young had made a settlement of their financial matters, and in this settlement it was shown that Fletcher was indebted to Young in the sum of \$440, for which amount Fletcher then gave his due-bill, or promissory note, to Young; that Fletcher, during the life of Young, made two payments on this due-bill, and after George Young's death paid the balance to the administrators; that at the settlement between Fletcher and Young, Fletcher made no mention whatever of the fact that he had paid this note of Harris, on which he and Young were cosureties, and made no claim against Young for any contribution on account of any alleged indebtedness arising from such payment; that Fletcher and Young resided about three miles apart, and were good friends; that prior to his death Young was sick about 15 months, and during that time the defendant Branch looked after Young's business, and Fletcher made no statement to Branch during this entire time as to any indebtedness which he claimed against Young on account of having paid the Harris note; and that nothing was ever said about it by Fletcher until four and a half years after Young died, when, for the first time, he claimed the amount for which the suit was brought.

It further appeared that during all the time from 1902, when Fletcher claims to have paid the note to the bank, until 1908, when Young died, a period of six years, Young was entirely solvent; that his estate was worth from \$17,000 to \$18,000; and that he owed no debts at the time of his death, except his physician's bill for his last sickness, and \$3.45, which he owed as a store account to Fletcher. It was further shown that during this same period between 1902 and 1908 Fletcher was practically insolvent, and in proof of the fact of his insolvency defendants introduced from the execution dockets two unsatisfied executions against him, amounting to \$150 principal, and \$221 principal, and they insisted before the jury that all these circumstances were sufficient to raise a presumption that if Young ever did owe the amount to Fletcher for which he brought suit, it had been fully paid by Young, and that these facts, taken all together, were sufficient to warrant the jury in finding a verdict in favor of the defendants.

Fletcher's motion for a new trial contained, besides the usual general grounds, the following special assignments of error:

- (1) He moved the court, first, to exclude all the testimony of

the defendant Branch, relating to the due-bill given by Fletcher to Young in the settlement between the two, on the ground that the evidence was irrelevant and immaterial, and illustrated no issue in the case; which motion was overruled by the court.

(2) The court, over the objection of movant, admitted the general execution docket of Irwin county, Ga., showing the executions in favor of the Holmes Savings Bank v. T. Y. Fletcher, for \$150, principal, and that of Frank & Co. v. Fletcher, for \$221, principal, both of which were dated April 15, 1907. He objected to the admission of this evidence, on the grounds that it was irrelevant, immaterial, and illustrated no issue in the case, and because the execution docket was not the best and highest evidence of the facts sought to be proved.

(3) Because the court erred in charging the jury as follows: "The defendants' contentions have been stated to you in the beginning, and I charge you that the execution of a promissory note or due-bill by one party to another is evidence in law that all prior past-due accounts owing from the payee of the due-bill or note to the maker of the same is settled, without they are excepted:" the ground of objection being that the charge was not applicable to the facts as developed by the evidence.

(4) The court erred in charging the jury as follows: "I charge you that if you should find that Fletcher gave to George Young, during his lifetime, a certain note or due-bill, after the indebtedness sued for is alleged to be due, then that would be presumptive evidence that the debt, if any ever existed, was canceled; and if you should believe that this presumption has not been rebutted and explained by the facts or circumstances, or the evidence in the case, then you would be authorized to find for the defendants; it being a matter, however, entirely for you to say as to whether or not, considering the case as a whole, the presumption referred to has been explained or rebutted." It is insisted that this charge was not applicable to the facts as developed by the evidence, inasmuch as it was shown that the due-bill in question was given as a part of a distinct and separate transaction from the indebtedness sued on, and entirely apart from it: and that it was error, for the further reason that it charged affirmatively that the evidence of the defendants had raised a presumption that payment had been made, and that it was incumbent on

the part of the plaintiff to rebut or explain such presumption and overcome the same with evidence.

(5) The court erred in charging to the effect that payment may be established by facts and circumstances, without fixing the time and place of payment: "the question of payment being determined by you from the facts in the case."

R. D. Smith, J. J. Walker, Elkins & Wall, for plaintiff.

H. J. Quincey, L. Kennedy, for defendants.

HILL, C. J. (After stating the foregoing facts.)

1. The exception relating to exclusion of the evidence of settlement and the giving of a due-bill by Fletcher to Young, and the charge of the court relating to the effect of this evidence, may be disposed of together. If the evidence was admissible, clearly the charge was pertinent and correct. Unquestionably the evidence was admissible. In fact, the circumstance which tended to prove that the decedent Young, intestate of the defendants, did not owe the plaintiff, Fletcher, anything was admissible in support of the answer of payment. The fact that Fletcher and Young had a settlement of their matters, and as a result of this settlement Fletcher gave his due-bill or promissory note to Young, was a circumstance of more or less probative value that Young did not owe Fletcher anything at that time; for, if he had been indebted to Fletcher, there would have been no reason why Fletcher should have given him his due-bill or promissory note, and if there was a settlement between them, it is fair to presume that all mutual accounts and claims would have then been made and adjusted, and a balance struck between them. That this in fact was done in the settlement, and the balance was in favor of Young, is indicated by the fact that Fletcher did give his due-bill or promissory note.

As early as in the case of *Mills v. Mercer*, *Dudley's Reports*, 158, it was held that the execution of a promissory note is evidence in law of a full settlement of accounts up to the date thereof, except such as were especially excepted at the time of the settlement; and the excerpt excepted to is in the very language of this opinion. Of course, the presumption was not conclusive. The court correctly stated that it was an inference of fact, and subject to be rebutted by evidence.

In *Baldwin v. Walden*, 30 Ga. 829, it was held that a credit on

a note, put there by the maker, is presumptive evidence that there was no account due by the holder to the maker. Both of these cases are referred to with approval in *Broughton v. Thornton*, 50 Ga. 571.

It is not objected here that these excerpts from the charge did not state a correct principle of law, but they are objected to for the alleged reason that they do not illustrate any issue in the case. It seems to us that they do illustrate the only issue in the case, to wit, whether or not Young owed Fletcher the debt for which the administrators were being sued; it being contended that if Young did in fact owe this debt to Fletcher, and it was in existence at the time of the proved settlement between them, it was either included in the settlement, or did not exist, because not then referred to by Fletcher; the witness testifying that he was present when the settlement was made, and no reference was made to this debt by Fletcher to Young. In *Norton v. Aiken*, 134 Ga. 24 (67 S. E. 425), it is said that "any circumstance which tends to make the proposition of payment more or less probable may be considered by the jury." Certainly the failure of Fletcher to mention this debt to Young at the time of the settlement was a circumstance which tended to establish the fact that Young did not owe Fletcher the debt.

It is insisted by learned counsel for the plaintiff that the testimony as to this settlement and the giving of this due-bill or note was not relevant, and the charge of the court, relating thereto, was not pertinent, because the settlement was as to different matters between Fletcher and Young than that growing out of his right of contribution as a cosurety for Harris. This may affect the probative weight or value of the testimony, but does not destroy its relevancy, or make improper the charge referred to. Of course, if the due-bill given by Fletcher to Young had been given expressly in reference to a claim of Fletcher against Young, growing out of his relation of cosurety on the note given by Harris to the bank and its payment by Fletcher, it would have been conclusive against Fletcher. But it was a circumstance, in any event, which tended to raise a presumption against him that Young did not owe him anything at the time of the settlement; for it must be conceded that, being an insolvent man, according to the evidence, Fletcher would hardly have been giving his due-bill or promissory note

to a creditor, if, at that time, this creditor was in his debt. He would have claimed the debt, and would then have insisted upon its payment. So we conclude on this part of the case that the evidence was properly admitted, and the charge was properly given.

2. In the ruling of the court in admitting in evidence the general execution docket, showing the entry of the executions against Fletcher, there was probably error. The evidence was secondary; the best evidence being an exemplified copy of these entries. This error, however, was not material, and hardly contributed to the verdict. The existence of the unpaid executions was only a slight circumstance against the plaintiff; and, irrespective of this evidence, in our opinion the verdict is amply supported.

3. There was no error in the charge of the court that payment might be established by facts or circumstances, without fixing the time or place of payment; the question of payment being one for the jury to determine from the facts in the case. It is the fact of payment, and not the time or place of the payment, that is the essential fact to be proved; and if the evidence established the fact of payment, it is wholly immaterial that it did not go further and prove the place and time when the payment was actually made. Proof of the time and place of payment might render the evidence of payment stronger, but certainly the failure to prove the time and place could not destroy the probative value of the proof that payment was in fact made.

4. We think there was sufficient evidence to warrant the jury in coming to the conclusion that if Young, the intestate of the defendants, ever owed Fletcher the \$1,000, he paid the debt during his lifetime. Fletcher alleges that he paid this note on which Young was cosurety to the bank in 1902. For six years thereafter he made no claim upon Young for contribution, although during that time Young was entirely solvent and lived near Fletcher, and during that time Fletcher had had a settlement with Young, and had given Young his due-bill for \$440. During this time, also, Young was sick for 15 months, and Branch, one of the administrators, attended to his business; and yet Fletcher, with no written evidence that he had paid the surety debt of Harris in his possession (for he testified that he had lost the note which he had paid), did not say one word as to the existence of this debt,

either to Young or to his agent, Branch. These facts and circumstances, taken all together, fully warrant the inference, either that Young had never owed the debt sued for, or, if he had owed it, had paid it; and this reasonable inference was not in any manner rebutted by evidence. No error appears to have been committed, the verdict is supported by the evidence, and the court did not err in overruling the motion for a new trial.

Judgment affirmed.

POWELL, J., concurring specially. I doubt that the presumption or inference of settlement of previous differences arising from the giving of a note or due-bill is as broad as the opinion of the Chief Judge indicates, but, as applied to the facts of the present case, the charge was not misleading or erroneous. Besides, it should not be overlooked that the alleged indebtedness for contribution had become barred by the statute of limitations, before the death of the decedent, even if it had not been discharged. Though the statute of limitations was not pleaded, the very fact of the lapse of time, without claim of indebtedness, greatly enhances the inference arising from the giving of the due-bill.

Judge Russell authorizes me to state that he concurs with these views.

3284. HENDERSON v. DE MEDICIS.

HILL, C. J. The possession of the personal property described in the possessory warrant was not acquired by the defendant by any of the modes set forth in section 5371 of the Civil Code (1910), and a judgment in favor of the plaintiff was for that reason unauthorized, and, on certiorari, the court properly set it aside and rendered final judgment in favor of the defendant. *Dennard v. Butler*, 2 Ga. App. 198 (58 S. E. 297); *Brown v. Todd*, 124 Ga. 939 (53 S. E. 687).

Judgment affirmed.

DECIDED DECEMBER 10, 1911.

Certiorari; from Richmond superior court—Judge H. C. Hammond. January 20, 1911.

B. B. McCowen, for plaintiff.

Pierce Brothers, for defendant.

3331. *HAZZARD v. MAYOR AND ALDERMEN OF SAVANNAH.*

RUSSELL, J. Even if the evidence was insufficient to authorize the verdict rendered by the justice of the peace, the judge of the superior court erred in rendering final judgment in favor of the defendant. In sustaining the certiorari, he should have ordered a new trial, for the plaintiff might be able to supply any deficiency of evidence on another trial. The judgment is therefore affirmed, with direction that it operate to order a new trial in the justice's court.

Judgment affirmed, with direction.

DECIDED DECEMBER 19, 1911.

Certiorari; from Chatham superior court—Judge Charlton. July 20, 1911.

Twiggs & Gazan, for plaintiff in error.

Samuel B. Adams, H. E. Wilson, contra.

3345, 3346. *CHANDLER v. ATLANTIC COAST LINE RAILROAD CO.*
et al., and vice versa.

HILL, C. J. The constitutional questions raised by the record in this case were certified to the Supreme Court for instruction, and the decision of that court thereon, rendered August 15, 1911 (136 Ga. 638, 71 S. E. 1066), is controlling, and requires a reversal on the main bill of exceptions. The judgment on the cross-bill of exceptions is affirmed, as the special demurrer was without merit.

Judgment reversed on main bill of exceptions; affirmed on cross-bill.

DECIDED DECEMBER 19, 1911.

Action for damages; from city court of Waycross—Judge Lankford. January 17, 1911.

Crawley & Crawley, R. L. Berner, John S. Walker, for plaintiff.

Bennet, Twitty & Reese, Wilson, Bennett & Lambdin, for defendants.

3353. *SAMS v. COVINGTON BUGGY CO.*

The statute prescribing the character of service in suits where minors are interested or are parties does not strictly apply, where there is a seizure of property under foreclosure proceedings, and the minor whose property is seized makes the process in rem (otherwise final) mesne, by making the counter-affidavit. The issue before the court is not made by service, but is made by seizure and the filing of the counter-affidavit.

In such case the absence of a *prochein ami* or guardian *ad litem* as a party is an irregularity, amendable before, and cured by, the verdict.
DECIDED DECEMBER 19, 1911.

Foreclosure of lien; from city court of Covington—Judge Whaley. March 25, 1911.

Rogers & Knox, for plaintiff in error.

C. C. King, contra.

HILL, C. J. The plaintiff in error was the owner of an automobile, which was repaired by the defendant in error. He did not pay for the repairs, and the defendant in error foreclosed its lien as a mechanic, against him, for the sum of \$30 for materials furnished and repair work on the automobile. He filed a counter-affidavit, setting up that the amount sworn to be due was not due, and alleging that the plaintiff did not complete and perform its contract according to the agreement, and he had been thereby damaged in the sum of \$50; and he also executed a replevy bond. When the issue thus made was called for trial, he was absent and not represented by attorney, and the jury found a verdict against him for \$30, upon which a judgment was entered. During the same term he presented to the court a petition to set aside the verdict and judgment, alleging that he was a minor when the verdict and judgment were rendered, and had a statutory guardian (giving his name), and that this guardian was not served in the case or made a party thereto, and no guardian *ad litem* was appointed by the court. The judge's refusal to set aside the judgment is the error assigned.

Section 5565 of the Civil Code (1910) requires that service upon minors under the age of 14 years shall be perfected personally on the minor, and in cases where there is a statutory or testamentary guardian or trustee representing the interest of the minor to be affected by the legal proceedings, service must also be made upon such guardian or trustee; and if the minor is over 14 years of age, service may be made by delivering to him personally a copy of the writ. And it is further provided that, in the absence of guardian or trustee, it shall be the duty of the court to appoint for the minor a guardian *ad litem*, who must be made a party to the proceedings before the minor shall be considered a party. In the case of *Miller v. Luckey*, 132 Ga. 581 (64 S. E. 658), it was held that where suit is brought against a minor, and

he is not personally served, a plea in abatement setting up the want of personal service should be sustained.

In this case it does not appear how old the minor was, whether over the age of 14 or not; but there is no allegation that he was not personally served with process. The contention is that his statutory guardian was not served, and not made a party to the suit, and no guardian ad litem was appointed by the court for him and made a party to the proceeding. In suits in personam the law as thus claimed would be applicable; but we do not think it applicable to a case such as the one now under consideration. Here was a proceeding in rem, to foreclose a mechanic's lien. It did not become a suit, in the technical sense of that word, until the defendant had made a counter-affidavit; and until the counter-affidavit was made and filed there was no case or suit pending in the court, no issue to be tried. There are two ways by which parties are brought before the court. One is, in suits in personam, by personal process, or, in the case of minors, by such process as the statute requires; and the other is where property is seized by process of court, and the proceeding is resisted by a claim to the property, or some issue in reference to the process by which the property is seized. Now, in this case the minor voluntarily made a counter-affidavit. He made the proceeding, which otherwise would have been final, a mesne process, on the suit pending, in which he was the substantial plaintiff, though not nominally so, for his counter-affidavit was the beginning of the suit, in so far as the issue to be tried by the court was concerned. *Giddens v. Gaskins*, 7 Ga. App. 221 (66 S. E. 560). In other words, the issue was made and brought into the court by the minor by the filing of his counter-affidavit. Now, the law in this State is well settled that a minor can bring suit or voluntarily intervene in a suit without any prochein ami or guardian ad litem, and a failure to have such a representative as a party is a mere irregularity, which, before verdict, is amendable, and is cured by the verdict. Civil Code (1910), § 5524, and decisions of the Supreme Court cited in *Michie's Enc. Digest*, 312.

The minor, having brought or filed the suit by his counter-affidavit and made the issue to be decided by the court, strictly speaking, should have been represented therein by his statutory guardian or guardian ad litem; and if the matter had been called

to the court's attention, or to the attention of the other party, this formal requirement of the statute would doubtless have been complied with by proper amendment. But the minor, in his defense to the suit originally, did not disclose his minority. He silently permitted a judgment to be entered against him without disclosing the fact, and therefore the irregularity was cured by the verdict. For this reason we think the court very properly refused to set aside the judgment. *Judgment affirmed.*

3357. FOOTE & DAVIES Co. v. EVANS FURNITURE Co.

HILL, C. J. The explicit requirements of the statute imperatively demand that, to give this court jurisdiction, the bill of exceptions must be filed in the clerk's office within 15 days from the date of the certificate of the judge to the bill of exceptions. Here the certificate is dated March 14, 1911, and it was filed March 30, 1911. The writ of error must be dismissed. Civil Code (1910), § 6167; *Jones v. State*, 7 Ga. App. 694 (67 S. E. 835), and cases cited.

Writ of error dismissed.

DECIDED DECEMBER 19, 1911.

Certiorari; from Fulton superior court.

Payne, Little & Jones, M. F. Goldstein, for plaintiff in error.

Munday & Cornwell, contra.

3374. WHIDDEN v. CITY OF THOMASVILLE.

HILL, C. J. 1. The judgment sustaining the general demurrer to the petition is a final judgment, from which a writ of error will lie.

2. Where a bill of exceptions recites that the court sustained a general demurrer, and that "the plaintiff in error excepted to the order sustaining said general demurrer, and assigns the same as error," the assignment of error is sufficient. *O'Neal v. Miller*, 9 Ga. App. 180 (70 S. E. 971).

3. In a suit to recover damages from a municipal corporation for an alleged injury resulting from a defective construction of a street, it is not necessary to allege either actual or constructive notice of such defective construction. Civil Code (1910), § 898; *Mayor etc. of Montezuma v. Wilson*, 82 Ga. 206 (9 S. E. 17, 14 Am. St. R. 150).

4. The allegations of the petition, in form and substance, set forth a cause of action, and the court erred in sustaining a general and special demurrer thereto. *Judgment reversed.*

DECIDED DECEMBER 19, 1911.

Action for damages; from city court of Thomasville—Judge W. H. Hammond. March 27, 1911.

The petition alleges, that the defendant damaged the plaintiff in the sum of \$200, by reason of negligence hereinafter set forth; that a claim in writing (a copy of which is set forth) was presented to the defendant by the plaintiff, in which payment of the amount of the damage was demanded, and that payment was refused. The remaining allegations are as follows: (Paragraph 5) "Your petitioner shows that at a certain point on Oak street, within the limits of the city of Thomasville, the defendant had, for a number of years prior to and until a short time prior to the injury complained of, maintained a bridge over a certain branch which crosses Oak street; that this bridge was constructed by the use of heavy timbers, which were attached to posts on either side of the branch, so as to form a solid wall on each side thereof, and then a top or covering was attached, on a level with the street, so as to form a platform or bridge across said branch; that said bridge as thus constructed left an aperture or opening underneath, about five feet in width and about four and one half or five feet high, which enabled all of the waters flowing down said branch and also all the waters that flowed from eastward and from a westward direction along Oak street to this point, even in case of excessive rainfall, to pass off without damaging the street. (6) Your petitioner shows that said City of Thomasville, a short time prior to the injury complained of, removed the top or covering from said bridge and inserted in the bed of said branch, between the wooden walls of the bridge, a drain-pipe 15 inches in diameter, and then filled in on either side and on top of said drain-pipe with earth, up to the level of the street, and this drain-pipe was the only means provided by the city for carrying off the waters that accumulated at that point. (7) Your petitioner shows that said city has so laid out, constructed, and graded said Oak street that the surface water flows down hill, from both the eastward and westward, along said street to the point where said branch intersects the street at the mouth of said drain-pipe, and there intermingles with the water of the branch, all of which water finds its only outlet thence through said drain-pipe. (8) Your petitioner shows that in time of ordinary rainfall said drain-pipe was entirely inadequate to convey the water that accumulated at the

mouth of said drain, and that the defendant, in the construction of said drain, had negligently failed to place any header or other device at the mouth of said drain, to prevent the waters thus accumulating at this point from washing under and around said drain-pipe and underneath said street; that as a result of this the waters had undermined said street, by forcing an outlet underneath the street by washing out the soil with which said drain-pipe had been covered. (9) Your petitioner shows that on the 12th day of October, 1910; while a certain mule was being driven with due care along said Oak street by a servant of the petitioner, and while said mule was passing over said drain-pipe, that, unknown to your petitioner and to said servant, the said earth over and around said drain-pipe had been so undermined by the waters that the same caved in while said mule was in the act of passing over the same, and caused said mule to be thrown down and killed. (10) Your petitioner alleges that said injury was occasioned [by] and due solely to the negligence of the defendant in the construction of said drain-pipe underneath said street, and to this end alleges: 1. That the defendant was negligent in placing underneath said street a 15-inch drain-pipe, which it knew or ought to have known was totally inadequate and insufficient to carry off said waters. 2. In not providing a suitable device at the mouth of said drain-pipe to prevent the water which had accumulated there from washing away the earth around said drain-pipe and undermining said street. 3. In not constructing said drain-pipe in such a manner as to have prevented said washing, and to have prevented said street from caving around said drain-pipe."

Besides demurring generally to the petition, the defendant demurred specially to paragraph 5 as "irrelevant and impertinent to the issue;" and to paragraph 9 because "it fails to allege that the defendant had notice, actual, constructive, or legal, of any defect in its street at the time of the alleged injury to the mule," and because it does not set forth the manner in which the mule was killed.

Theodore Titus, for plaintiff.

T. N. Hopkins, J. H. Merrill, for defendant.

3377. MOORE v. COFIELD.

A. held a mortgage on two mules, and B. held a junior mortgage on one of them. The mortgagor, by the consent of A., and without the knowledge or consent of B., sold the one not covered by B.'s mortgage, and applied the proceeds to the payment of an open account which A. held against him. B. foreclosed his mortgage, and, under the execution, seized and sold the mule covered thereby. The amount realized from the mortgagor's sale of the mule covered by A.'s mortgage would have been sufficient to have paid the balance due on A.'s mortgage, as well as the mortgage *fi. fa.* held by B. *Held*, that, in the distribution of the fund in the hands of the court, equitable principles should control, and, under the facts, there was no error in the judgment awarding the money to B.'s mortgage *fi. fa.*

DECIDED DECEMBER 19, 1911.

Money rule—appeal; from Walton superior court—Judge Brand.
February 28, 1911.

W. O. Dean, for plaintiff in error.

A. C. Stone, contra.

HILL, C. J. The question in this case arose on the distribution of a fund in the hands of the sheriff, arising from the sale of mortgaged property under execution. Cofield held a mortgage on one mule. Moore held a prior mortgage on this mule and on another mule. Cofield foreclosed his mortgage, and had the mule levied upon and sold, and the fund realized from this sale was claimed by Moore, under his senior mortgage. The undisputed evidence before the court, on the hearing of the rule, showed that Moore agreed that the mortgagor should sell the mule not covered by Cofield's mortgage, and apply the proceeds arising from the sale of this mule to a debt or account against him, held by the firm of which Moore was a partner; and the money arising from the sale of the mule was accordingly applied to the payment of this debt. Cofield did not know of this arrangement between Moore and the mortgagor. If the money realized from the sale of the mule on which Moore held a mortgage had been applied on this mortgage, it would have reduced this senior mortgage to only \$15 or \$20, and the money arising from the sale of the mule under the mortgage foreclosure by the sheriff would have been sufficient to pay off this balance and also the mortgage *fi. fa.* held by Cofield. Cofield contended that under these facts he was in justice and equity entitled to have the money realized from the sale of this mule, to pay off his mortgage *fi. fa.* The judge, without the in-

tervention of a jury, tried the question of law involved, and rendered a finding in favor of Cofield.

We think the decision of the judge was within the well-settled principle, codified in section 3220 of the Civil Code (1910), that, "as among themselves, creditors must so prosecute their own rights as not unnecessarily to jeopard the rights of others; hence a creditor having a lien on two funds of the debtor, equally accessible to him, will be compelled to pursue the one on which other creditors have no lien." See, also, section 4609; *Mulherin v. Porter*, 1 Ga. App. 153 (58 S. E. 60). *Judgment affirmed.*

3389. MOORE v. MAY.

An owner of real estate, by employing an agent to effect the sale thereof under a written contract under seal, does not preclude himself from selling it, provided he makes the sale in the utmost good faith, without any purpose to defraud the agent of his right to commissions under the contract. The fact that the contract provides that the agency created thereby is irrevocable for the term of three months is not of itself sufficient to prevent the owner from himself selling the property within that time, if he does so, as above stated, in the utmost good faith, to a person with whom the agent has had no prior negotiations relating to the sale or purchase of the property.

DECIDED DECEMBER 19, 1911.

Complaint; from city court of Nashville—Judge Buie. April 12, 1911.

Hendricks & Christian, for plaintiff.

J. P. Knight, W. G. Harrison, for defendant.

HILL, C. J. The sole question in this case arises on the following contract: "Georgia, Berrien County. Know all men by these presents, that I have this day appointed J. W. Moore my agent to negotiate the sale of the following lands [described]. I obligate myself to make warranty deeds to said lands to any party named by my said agent upon the payment of \$700, payments to be made as follows: \$100 cash; balance \$100 quarterly at 8 per cent. interest from date. And I allow my said agent \$100 as a remuneration for his services and expense in getting purchaser—all amounts he or they, the said agent, may contract for over and above the sum of \$700. This agency is created for the term of

three months, and is irrevocable. Witness my hand and seal this the 4th day of April, 1910. [Signed] C. D. May. (Seal.)”

Moore brought suit against May to recover his commission as real-estate broker under the terms of this contract. He alleges, that he found and obtained a purchaser for the lands described in the contract, who was willing, able to buy, and desirous to purchase said lands upon the terms and conditions set forth in the contract, and that the defendant was requested to execute a deed to the purchaser named and he (plaintiff) tendered to the defendant the net purchase-price for which the defendant had agreed to sell the described real estate, within the time designated by the contract; that the defendant refused to execute a deed to the purchaser, and refused to pay plaintiff his commission. He further alleges that the defendant, after making this contract and within three months from the making of the same, himself sold the described lands “to another party other than petitioner or any party named by him.” The trial judge sustained a general demurrer, and dismissed the petition, and this judgment is here for review.

Section 3587 of the Civil Code (1910) contains the following language: “The fact that property is placed in the hands of a broker to sell does not prevent the owner from selling, unless otherwise agreed.” It is insisted by the plaintiff that the contract was in terms exclusive and was substantially an agreement that the owner of the property who made the contract relinquished absolutely to the real-estate broker, for the term of three months, his right to sell the real estate. In support of this contention this clause in the contract is relied upon: “This agency is created for the term of three months, and is irrevocable.” It is said that the word “irrevocable” is equivalent in meaning to the word “exclusive,” and that the intention of the maker of the contract, in the use of this word, was to give to the agent or real-estate broker, for the three months, the sole right to sell the real estate; that neither the owner of the real estate nor any other agent had the right during the three months to make a sale of the real estate that would prevent the broker from recovering his commission.

We do not agree with this construction of the language of the contract. The word “irrevocable” simply means that the agent would have the three months in which to make the sale on the terms stipulated, and that during three months the agency was

not revocable by the maker of the contract, and possibly that during the three months no other agent or real-estate broker would have the right to sell the real estate described in the contract. We do not think that the language relied upon is sufficient to constitute an agreement surrendering the owner's right to sell his property himself. The statute gave him this right, unless by contract it was otherwise agreed. And the mere stipulation that the contract of agency was irrevocable was not sufficient to prevent the owner from the exercise of his right as owner to make a personal sale of his property. In the case of *Kidman v. Howard*, 18 S. D. 161 (99 N. W. 1104), it was held that a contract conferring agency to sell real estate, which contained the clause that the agency was to exist until the property therein described was sold by the agent, did not exclude the right of the owner of the real estate personally to make a sale of the property; and it has been frequently held that the owner of real estate, by employing a real-estate agent or broker to effect the sale of property, does not preclude himself from employing other agents for the same purpose, or from effecting a sale himself, provided that in making the sale himself he acts in good faith; "good faith" meaning that the owner would not be allowed, after making a contract with a real-estate broker, to avail himself of the broker's services, where the broker had procured a purchaser, and to effect the sale himself, thereby depriving the broker of his commission. The agent is entitled to his commission "when, during the agency, he finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner." Civil Code (1910), § 3587. But if, before the broker finds a purchaser, the owner himself sells the property to a person with whom the broker has had no negotiations relating to the property, and the broker has had nothing to do with procuring the purchaser to whom the owner has sold, and the owner has acted entirely in good faith, and not endeavored in any manner to defraud the broker in reference to the contract, the agent would not be entitled to his commission. *Gresham v. Connally*, 114 Ga. 906 (41 S. E. 42); *Mechem on Agency*, § 967.

In this case there is no allegation of bad faith of the owner of the property in connection with the sale. On the contrary, it is alleged that the owner sold the property to another party, and not to the party found or named by the broker. We therefore conclude that the judgment of the lower court must be *Affirmed*.

3415. PRUITT v. PACE.

HILL, C. J. This was a foreclosure of a laborer's lien claimed under section 2792 of the Civil Code of 1895, now section 3334 of the Civil Code of 1910; and, the evidence of the alleged "laborer" clearly showing that he was not a "laborer," in the sense in which that word is used in the statute, there was no error in sustaining the certiorari and in entering final judgment against him. The case is fully controlled by the decision in *Howell v. Atkinson*, 3 Ga. App. 58 (59 S. E. 316).

Judgment affirmed.

DECIDED DECEMBER 19, 1911.

Certiorari; from Floyd superior court—Judge Maddox. March 25, 1911.

The work on account of which a laborer's lien was claimed was done in a furniture store, under an agreement that the plaintiff was to be paid \$25 per month for his work. He testified: "I was manager of Mr. Pace's store, and did all the work in connection with the running of the said store, including the keeping of the books, looking after his collections, and the selling of the merchandise. I also opened up the store in the morning, swept up the store, and, with the assistance of the liveryman hauling the furniture, loaded and unloaded it on the dray."

Eubanks & Mebane, for plaintiff.

Ennis & Shaw, for defendant.

3420. VERUKI v. SAVANNAH ELECTRIC CO.

Where an appeal was timely entered in a justice's court, and the appeal bond was taken and approved by the justice, who recited that the cost of the appeal had been paid by the appellant, these facts show that the appeal was properly entered; and, where the appeal was timely transmitted by the justice to the clerk of the superior court, the failure of the justice to make a formal entry of filing on the appeal papers, even if the statute required the entry to be made, was not, of itself, sufficient ground for the judge of the superior court to dismiss the appeal. The appellant, having done everything that the law required of him to entitle him to an appeal, should not be deprived of the right by the failure of the justice to perform the merely formal act of marking the proceedings filed, since they were in fact and in substance actually filed.

DECIDED DECEMBER 19, 1911.

Appeal; from Chatham superior court—Judge Charlton. March 28, 1911.

Wilson & Rogers, for plaintiff in error.

Osborne & Lawrence, Edmund H. Abrahams, contra.

HILL, C. J. This was an appeal from a justice's court to a jury in the superior court. When the case was called in the superior court, the plaintiff moved to dismiss the appeal, on the ground that the appeal had never been filed in the office of the justice of the peace, and the court sustained the motion, in the following order: "Upon motion of the Savannah Electric Company, the foregoing appeal is hereby dismissed; it appearing never to have been filed in the office of the justice of the peace." To the judgment dismissing the appeal the defendant excepted.

Section 4998 of the Civil Code (1910) provides that "in all civil cases tried and determined by a county judge or a justice of the peace, . . . where the sum or property claimed is more than fifty dollars, either party may, as a matter of right, enter an appeal to the superior court." Section 5000 requires that appeals shall be "entered within four days after the adjournment of the court in which the judgment was rendered." The record in this case shows that within the four days allowed for entering an appeal in the justice's court the following proceedings were had in that court:

"Savannah Electric Company v. Eli Veruki. In Justice Van Giesen's Court. October Term, 1909. Suit on account. Judgment for plaintiff. And now, within the time allowed by law, comes Eli Veruki, and, being dissatisfied with the judgment in the above-stated cause and having paid the costs in said cause, enters this his appeal to a jury in the superior court, and the said Eli Veruki, as principal, and the undersigned, M. K. Jones, as security, hereby acknowledge themselves bound for the eventual condemnation money in said cause. Witness our hands and seals this twelfth day of October, 1909. Eli Veruki. [L. S.] M. K. Jones. [L. S.]

"Bond approved and all costs paid this October 25, 1909. F. S. Van Giesen, J. P. 2nd G. M. District, C. C. Ga. [Official Seal.]"

It would seem from this record that the appellant had complied fully with the requirements of the statute, and was entitled to have his appeal entered and transmitted to the superior court of the county. Having so entered his appeal, paid the costs, and given the appeal bond, there was nothing more for him to do; and

when this had been done the law required the justice of the peace to transmit the same to the clerk of the superior court. Section 5013 of the Civil Code (1910) provides that, "when an appeal from the judgment of a justice of the peace or notary public has been entered, it shall be the duty of such justice of the peace or notary public to transmit the same to the clerk of the superior court of the county in which proceedings may have been had, at least ten days before the next superior court of said county." Nothing is said in the statute about requiring the justice of the peace to formally mark the appeal papers filed in his office. It would seem that the filing could be presumed from the entering of the appeal in the office of the justice of the peace and the approval of the appeal bond by the justice of the peace, with the statement that the costs of the appeal had been paid by the appellant; and when the appeal proceedings made timely appearance in the superior court of the county, it would be fair to presume that the record in the appeal case had been transmitted by the justice of the peace to the clerk of the superior court. It is immaterial how the justice of the peace transmitted the papers. If they were in fact transmitted and got into the possession of the clerk of the superior court in any manner, it was sufficient; and it must be presumed that the justice of the peace did transmit these papers to the clerk of the superior court; the presumption as to all officers, until the contrary appears, being that they have done their official duty.

We know of no law that requires a justice of the peace to mark appeal papers as filed in his office. If all of those things are done by the appellant which the statute says he shall do to entitle him to an appeal, in our opinion he would be entitled to the appeal, although the justice of the peace had not marked the papers constituting the appeal proceedings as of file in his office. We can not think that the mere failure of the magistrate to make a formal entry of filing, which is purely a ministerial act, should work such an injury to the appellant as to have his appeal dismissed, when the proceedings show that he had complied strictly with all that the law required of him in entering his appeal, in giving his appeal bond, and in paying the costs.

In *Pearce v. Renfroe*, 68 Ga. 194, it was held to be no cause of dismissal of an appeal that the magistrate did not file the papers

in the office of the clerk of the superior court within the time required by law, or did not send up the judgment rendered by him, or made no proper certificate that the appellant had, within the proper time, paid the costs and given the bond. "When an appellant has done his duty, the mistake of the magistrate may be corrected."

In *Holt v. Edmondson*, 31 Ga. 357, it was held that when a party, desiring to appeal, pays the costs, tenders security, and demands an appeal from the clerk during the term at which the judgment was rendered, and, through fault of the clerk, the appeal is not entered, the court, on application, will order the appeal to be entered nunc pro tunc. It follows logically from this that if the justice of the peace was required to formally mark the appeal proceedings filed in his office, and he failed to do so, and it appeared that the appeal had nevertheless been entered, and all the requirements of the statute entitling the appellant to appeal had been complied with by him, the justice could be required to mark this entry of filing nunc pro tunc, on the hearing of the appeal in the superior court. The right of appeal is an important right; and, where the appellant has done everything that the statute requires him to do in order to secure this right, it would be a great wrong to deprive him of this right through no fault of his own, but on account of the failure of the justice of the peace to make the formal entry of filing.

For these reasons, we think the learned judge erred in dismissing the appeal because it appeared "never to have been filed in the office of the justice of the peace."

Judgment reversed.

3421. *STOVALL & BROTHER v. JOINER*, administrator.

Where an affidavit for garnishment against an administrator omits the allegation that the defendant is insolvent, the omission may be supplied by amendment, unless in the meantime the garnishee, or some third party, has acted to his injury by reason of the omission.

DECIDED DECEMBER 19, 1911.

Garnishment; from city court of Nashville—Judge Cranford.
April 21, 1911.

The plaintiff in *fi. fa.*, through his attorney, made affidavit and bond for garnishment, in ordinary form, and the process of garnishment issued thereon was served on the administrator of the deceased ancestor of the defendant in *fi. fa.* The administrator, at the first term thereafter, answered that the defendant was entitled to a share in the estate, the exact amount of which could not at that time be given, but would be set up thereafter. At a later term of the court the administrator moved to dismiss the garnishment proceedings, because the affidavit failed to allege that the defendant was insolvent, or that he was a non-resident, as required by the Civil Code (1910), § 5304. Thereupon the plaintiff offered to amend the affidavit, by adding the allegation that the defendant was insolvent. The court refused to allow the amendment, and sustained the motion to dismiss the garnishment proceedings.

Hendricks & Christian, for plaintiffs.

Chastain & Gaskins, Alexander & Gary, contra.

RUSSELL, J. It is provided by the Civil Code (1910), § 5706, that "all affidavits that are the foundation of legal proceedings . . . shall be amendable to the same extent as ordinary declarations, and with only the restrictions, limitations, and consequences now obtaining in the case of ordinary declarations and pleas." This provision of the law changed the rule as it previously existed, into harmony with the statement of Chief Justice Bleckley that in this State the doctrine of amendment is as broad as the plan of universal salvation. *Ellison v. Georgia Railroad Co.*, 87 Ga. 691 (13 S. E. 809). The statute, being remedial in nature, is to be liberally construed, to the end that the vice aimed at may be fully cured. *Levin v. American Furniture Co.*, 133 Ga. 670, 671 (66 S. E. 888). Any amendment which is aimed to make the affidavit conform to the actual conditions existing at the time of its making is in the interest of truth and justice, and should not be disallowed for purely technical objections not going to the merits of the controversy. *Collins v. Taylor*, 128 Ga. 789, 790 (58 S. E. 446). The allegation that the defendant was insolvent was necessary to confer jurisdiction on the court; and, in the absence of such an allegation, either originally or by way of amendment, before prejudice therefrom to the rights of third parties, the garnishment proceedings are void, and the court has no juris-

diction to render judgment against the administrator. *National Lumber Co. v. Turner*, 2 Ga. App. 750 (59 S. E. 15). Construing the foregoing code section relating to the amendment of affidavits, however, in connection with section 5691, providing that "the omission to give the court jurisdiction in the pleadings is amendable," it appears that the omission to give the court jurisdiction by the allegations of the original affidavit may be cured by amendment. By the former section affidavits are expressly made amendable in all respects like pleadings, and by the latter section pleadings are expressly made amendable by supplying facts conferring jurisdiction; from which it follows that affidavits are amendable by supplying necessary jurisdictional facts.

A case similar in principle to the case at bar is that of *Johnson v. Johnson*, 113 Ga. 942 (39 S. E. 311). There suit was brought in a justice's court upon a promissory note for \$100 principal and 10 per cent. attorney's fees. Such a suit is not within the jurisdiction of that court; but nevertheless the Supreme Court held that the suit could be amended, so as to show that the amount really due upon the note at the time suit was begun was less than \$100, inclusive of attorney's fees. The actual facts existing at the time the suit was brought made the case one within the jurisdiction of the court, and the omission of the pleader to set forth all these facts can be supplied by amendment. In the case at bar the actual facts existing at the time the garnishment suit was begun show that the plaintiff held an unsatisfied execution against the defendant, and that the garnishee held property belonging to the defendant which in justice ought to go toward the satisfaction of the execution, and that the defendant was insolvent. These facts gave the court jurisdiction; and, under the law as we understand it, one of the facts, to wit, the insolvency of the defendant, could be supplied by amendment, which would relate back and become a part of the original proceedings. *Brumby v. Rickoff*, 94 Ga. 429 (21 S. E. 232). To hold otherwise would be to go contrary to the whole policy of our law and to the evident purpose and intent of the statutes referred to above. If the suit as originally begun contains the skeleton, the meat may be put on the bones by way of amendment. *Penn v. McGhee*, 6 Ga. App. 635 (65 S. E. 686). We hold, therefore, that the court erred in refusing to allow the amendment, and in dismissing the garnishment proceedings.

Judgment reversed.

3477. ATLANTIC COAST LINE RAILROAD CO. v. WHITAKER.

HILL, C. J. The statutory presumption of negligence, raised by proof that the plaintiff's cow was killed by the running of the locomotive and cars of the defendant railroad company, was fully rebutted by the undisputed evidence; and, other than the presumption, there was no evidence whatever of negligence. The verdict against the company is therefore contrary to law, because without any evidence to support it. *Macon, Dublin & Savannah R. Co. v. Hamilton*, 9 Ga. App. 254 (70 S. E. 1126); *Southern R. Co. v. Harrell*, 119 Ga. 521 (46 S. E. 637).

Judgment reversed.

DECIDED DECEMBER 19, 1911.

Certiorari; from Decatur superior court—Judge Frank Park.
May 10, 1911.

The railroad company was sued in a justice's court for damages on account of the killing of a cow by its cars, and a verdict was rendered against it for the alleged value of the cow. The case came to this court on exceptions to the overruling of the defendant's petition for certiorari, in which it was alleged that the verdict was contrary to law and the evidence.

At the trial the plaintiff testified, that his cow had been coming home every night until the night of July 10, 1902, but did not come home on that night, and he found her dead the next morning near the public-road crossing west of the defendant's station at Climax, and within a few feet of the railroad track, with injuries described, indicating that she had been killed by an engine. The defendant introduced two witnesses, one of whom testified as follows: "I am an engineer on the Atlantic Coast Line Railroad. I killed a cow on the date spoken of and about the same place spoken of, at the hour of 11:45 a. m. I did not kill this cow at this place at night. I did not have time to stop my engine. I was running about 35 or 40 miles an hour when I saw the cow. My engine was equipped with all the modern improvements and was in good shape. When I first saw the cow it was about 50 yards from me, on my right, and running towards the track. I was looking ahead carefully. When I saw the cow running towards the track I applied brakes and blew whistle. I tried to head her off by blowing whistle, but could not. I put on service brakes and checked the speed of my engine to about 20 miles an hour, when I struck the cow. I knocked her off on the south side of the track as she was crossing. I put on all the power of my service

air-brakes, but could not stop in time to save the cow. The emergency brakes are not allowed to be used, only in case of emergency, or when in danger of human life. I used all ordinary care and diligence to prevent killing the cow or injuring it, but could not do it. I saw the cow coming out of the woods, toward the track, and, had the woods not been near the track, probably I might have seen the cow in time to have saved knocking her off." The other witness for the defendant testified: "I was fireman on the engine . . . at the time this cow was killed which Mr. Whitaker is suing for. Mr. Poundstone [the preceding witness] blew his whistle and put on brakes, at which time I was putting in fire, and as soon as he did this I jumped to my box on the left of the engine and looked ahead and saw the cow running to cross the track. Mr. Poundstone put on service brakes, which is the highest power brakes allowed to be used except in case of emergency. The engineer is not allowed to put on emergency brakes except in cases where there is danger to human life or serious danger to the train itself. Mr. Poundstone did all he could to prevent killing the cow, but could not do so under the circumstances. I rang the bell to frighten the cow away. The brake held perfectly, but could not stop the train in that distance."

Pope & Bennet, R. G. Hartsfield, for plaintiff in error, cited: 9 Ga. App. 254; 7 Ga. App. 138; 3 Ga. App. 197; 119 Ga. 521.

G. G. Bower, contra, cited: 7 Ga. App. 566, 780; 6 Ga. App. 308, 499.

3503. **HORNE v. MAYOR AND COUNCIL OF MACON.**

RUSSELL, J. The evidence authorized the inference that the defendant was managing and operating for profit a "blind tiger," under the guise of a so-called locker club, and in connection therewith kept on hand intoxicating liquors for the purpose of illegal sale, in violation of the ordinance of the City of Macon.

Judgment affirmed.

DECIDED DECEMBER 19, 1911.

Certiorari; from Bibb superior court—Judge Felton. May 12, 1911.

Jesse Harris, for plaintiff in error.

A. W. Lane, contra.

3512. GEORGE v. THE STATE.

1. The evidence is weak, contradictory, and unsatisfactory, but legally sufficient to authorize the inference of guilt.
2. When the judge's charge is considered in connection with the defendant's contentions as disclosed by the evidence, no sufficient reason for granting a new trial appears.

Judgment affirmed. Russell, J., dissents.

DECIDED DECEMBER 19, 1911.

Accusation of sale of liquor; from city court of Sylvester—
Judge Williamson. May 16, 1911.

Perry, Foy & Monk, for plaintiff in error.

J. H. Tipton, solicitor, contra.

RUSSELL, J., dissenting. In the headnotes I have announced the conclusion of the majority of the court. Personally I am of the opinion that the plaintiff in error was entitled to a new trial, upon the assignment of error that the court failed to instruct the jury as to the degree of proof required where the conviction depends upon circumstantial evidence alone. I think that the jury should have been instructed that the guilt of the accused should have been manifest, to the exclusion of every other reasonable hypothesis save that of his guilt. I am aware that it is very difficult to fix the exact line of demarcation in many cases between direct and circumstantial evidence. To my mind, however, the inference of guilt which is authorized from the receipt of money, and the delivery shortly thereafter of intoxicating liquor, is purely circumstantial in its nature. I think, too, that the plaintiff in error rightly complains of the judge's use of the word "purchaser," in his instructions to the jury, as descriptive of the person to whom the whisky was delivered, in view of the fact that the defense rested upon proof that there was no purchase at all, and that he was sent merely to bring to the person who was shown to have received the whisky his own property, which he had previously acquired from a different person. The phrase employed by the judge (no doubt unintentionally, but in my opinion effectually) eliminated the defendant's defense.

3565. GAINOUS *v.* MARTIN.

Possessory warrant lies only for the recovery of personal property. Immature growing crops are not "personal property," but are realty; hence, possessory warrant is not one of the remedies allowed to the landlord against his cropper, under the provisions of the Civil Code (1910), § 3706, so far as such crops are concerned.

DECIDED DECEMBER 19, 1911.

Possessory warrant; from city court of Cairo—Judge Singletary. June 10, 1911.

R. C. Bell, Ira Carlisle, for plaintiff in error.

POWELL, J. Gainous was a cropper on Martin's farm. They had a controversy about the use of a well near the house occupied by Gainous; Gainous having forbidden Martin and his family to use the well. This was in early June, before the maturity of the crops. Martin swore out a possessory warrant for the crops, and to an unfavorable judgment thereon Gainous excepts.

Our statutes relating to the reciprocal rights and duties of landlord and cropper (Civil Code of 1910, §§ 3705-3707, inclusive) are as follows: "Whenever the relation of landlord and cropper exists, the title to and right to control and possess the crops grown and raised upon the lands of the landlord by the cropper shall be vested in the landlord until he has received his part of the crops so raised, and is fully paid for all advances made to the cropper in the year said crops were raised to aid in making said crops." "In all cases where a cropper shall unlawfully sell or otherwise dispose of any part of a crop, or where the cropper seeks to take possession of such crops, or to exclude the landlord from the possession of said crops, while the title thereto remains in the landlord, the landlord shall have the right to repossess said crops by possessory warrant, or by any other process of law by which the owner of property can recover it under the laws of this State." "Where one is employed to work for part of the crop, the relation of landlord and tenant does not arise. The title to the crop, subject to the interest of the cropper therein, and the possession of the land remain in the owner."

The right to pursue possessory warrant under the circumstances of the present case is asserted under that provision of section 3706 wherein it is stated that the landlord "shall have the right to repossess said crops by possessory warrant, or by any other process of

law by which the owner of property can recover it under the laws of this State." This provision, however, must be read in the light of the general law. Possessory warrant is essentially a remedy for the recovery of the possession of personal property—property capable of corporeal seizure and actual or constructive delivery into physical possession. Growing crops prior to maturity are realty. *Bagley v. Columbus Ry. Co.*, 98 Ga. 626 (25 S. E. 638, 34 L. R. A. 286, 58 Am. St. Rep. 325). Possessory warrant does not lie for the recovery of realty. Hence the plaintiff mistook his remedy, even if he had a cause of action under the circumstances of the case.

Judgment reversed.

3569. OUTCAULT ADVERTISING CO. v. AMERICAN FURNITURE CO.

1. The execution of a contract for advertising, on behalf of an ordinary mercantile corporation, purporting to be signed by one as general manager, is sufficiently proved to authorize its introduction in evidence, when it is shown that it was signed by the person purporting to have signed it, and that he was in fact the general manager of the corporation. Further, if the person so signing was not the general manager, but signed as such in the presence of the president of the corporation and with his knowledge and consent, the corporation is prima facie bound.
2. Conflict in the testimony of the plaintiff's witnesses is not to be solved by nonsuit.

DECIDED DECEMBER 19, 1911.

Complaint; from city court of Atlanta—Judge Reid. March 20, 1911.

Dorsey, Brewster, Howell & Heyman, Joseph D. Greene, for plaintiff.

Thomas & King, for defendant.

POWELL, J. The plaintiff (a corporation) sued another corporation upon an account for the furnishing of certain advertising service. In support of its case the plaintiff offered in evidence a written contract, purporting to be signed by one Satterwhite, as manager of the defendant corporation. A witness for the plaintiff swore that Satterwhite was manager, that he, in fact, signed the paper, and that one Mr. Reid was present and directed the signing. It was shown by aliunde testimony that Mr. Reid was the

president of the defendant corporation. One of the defendant company's letter-heads was in evidence, and on this letter-head Reid appeared as president and secretary and Satterwhite as general manager.

Upon proof, direct or circumstantial, that Satterwhite was general manager, and that he signed the contract, its execution as the act and deed of the corporation was at least *prima facie* proved. *Raleigh & Gaston R. Co. v. Pullman Co.*, 122 Ga. 700 (50 S. E. 1008). If Satterwhite was not manager, but signed the contract on behalf of the corporation as such, and signed it in the presence of the president and under his direction, it would likewise have been, *prima facie*, the company's act. *Phillips v. Hudson*, 9 Ga. App. 779 (72 S. E. 178). It is true that Satterwhite and Reid were afterward put upon the stand by the plaintiff, and testified that Satterwhite was only a salesman in the defendant's place of business, and that he had signed the contract without any authority from the corporation, and that Reid was not present or consenting thereto. The fact that there is a conflict in the testimony of the witnesses introduced by the plaintiff is no reason for granting a nonsuit. The issue of fact, nevertheless, goes to the jury. This proposition has been so repeatedly stated by this court and the Supreme Court as to need no further elaboration here.

The court erred in excluding the written contract, and, having erred in this respect, the judgment awarding a nonsuit must be reversed. *Proctor & Gamble Co. v. Blakely Oil & Fert. Co.*, 128 Ga. 606 (57 S. E. 879). *Judgment reversed.*

3593. SHARPE v. THE STATE.

An order refusing to allow a demand for trial in a criminal case to be spread upon the minutes of the court is not such a final judgment as will support a bill of exceptions.

DECIDED DECEMBER 19, 1911.

Accusation of misdemeanor; from city court of Reidsville—
Judge Collins. June 9, 1911.

H. H. Elders, for plaintiff in error.

Robert E. DeLoach, solicitor, contra.

RUSSELL, J. The defendant, under indictment for a misde-

meanor, made a demand for trial at the second term after the indictment was found. The judge refused to allow the demand, and from the order refusing to allow the demand the defendant sued out a bill of exceptions.

We are of the opinion that the bill of exceptions is premature. The remedy of the defendant was to except *pendente lite*, and then assign error in a bill of exceptions sued out from the final judgment. *Couch v. State*, 28 Ga. 64; Civil Code (1910), § 6138. Even if the demand had been allowed, that would not have been a final disposition of the case, for it would only have entitled the defendant to a trial at that term or at the subsequent term, provided that at both terms there were juries impaneled and qualified to try him. Penal Code (1910), § 983. It does not appear that the refusal to allow the demand has harmed the defendant. Harm from such refusal can not be shown until after the expiration of the next succeeding term thereafter; for, even though the demand be refused, he may nevertheless be tried within the time which the State would have had, if the demand had been allowed.

The case of *Dacey v. State*, 15 Ga. 286, which apparently announces a contrary doctrine, was decided prior to the Code of 1863, at which time our present law limiting the Supreme Court to the review of final judgments first came into existence. Prior to that time the jurisdiction of the Supreme Court as to bills of exceptions was not confined to a final, or a conditionally final, adjudication in the lower court, as it is now. As to the original act of 1845, organizing that court (Acts 1845, p. 18), it was said: "This grant of jurisdiction was designed to be and is very broad. It attaches upon any *decision, sentence, judgment, or decree* which may be had before the superior courts in any case, criminal or civil. Unlike the jurisdiction of the Supreme Court of the United States, it is not confined to *final judgments*. It contemplates unquestionably writs of error upon interlocutory judgments." *Carter v. Buchanan*, 2 Ga. 338; *Jones v. Dougherty*, 11 Ga. 308. By comparing the decision cited above with the present law, it appears that our jurisdiction is limited to bills of exceptions sued out from final judgments. An order refusing to allow a demand for a trial to be spread upon the minutes is not a final judgment.

Writ of error dismissed.

3786. BYRD v. THE STATE.

- POWELL, J. 1. Under all the circumstances, the court did not err in overruling the motion for a continuance.
2. Where the defendant, though under illegal arrest at the time, consents to be searched, and the search discloses that he has hidden upon his person stolen property, evidence of the discovery of the property in this manner is admissible against him in a prosecution for the larceny. *Williams v. State*, 100 Ga. 511 (28 S. E. 624, 39 L. R. A. 269).
3. Under the evidence, the court properly confined the issue to the count in the indictment which charged larceny from the house.
4. The evidence fully authorized the conviction; and no material error appears. *Judgment affirmed.*

DECIDED DECEMBER 19, 1911.

Accusation of larceny; from city court of Blackshear—Judge Milton. October 12, 1911.

James R. Thomas, for plaintiff in error.

S. F. Memory, solicitor, contra.

3787. WHIPPLE v. THE STATE.

- HILL, C. J. 1. On the trial of an accusation in a city court, the solicitor, after the accused had been arraigned and the jury stricken and sworn, but before any evidence was introduced, made a formal amendment to the accusation, which was not then objected to by the accused. Subsequently, when testimony was offered to prove the truth of the amendment, the accused objected to the evidence, and then made an oral demurrer to the amendment to the accusation. *Held*, the objection to the amendment came too late. If good at all, the objection should have been interposed when the amendment was offered, and not delayed until after testimony had been offered in support of the allegation covered by the amendment. The delay in making the objection to the amendment operated as a waiver thereof.
2. The objections made to rulings on the admissibility of evidence are without merit. No error of law appears, and the verdict is fully supported by the evidence. *Judgment affirmed.*

DECIDED DECEMBER 19, 1911.

Accusation of discharging pistol on highway; from city court of Dublin—Judge Hawkins. September 23, 1911.

R. Earl Camp, for plaintiff in error.

George B. Davis, solicitor, contra.

3789. MOYE v. THE STATE.

POWELL, J. 1. There was no error in overruling the motion for a continuance.

2. The evidence authorized the verdict. *Judgment affirmed.*

DECIDED DECEMBER 19, 1911.

Accusation of cruelty to animal; from city court of Dublin—
Judge Hawkins. September 23, 1911.

J. E. Burch, for plaintiff in error.

George B. Davis, solicitor, contra.

3790. STEWART v. THE STATE.

HILL, J. 1. The evidence that the accused, on four separate and distinct occasions, procured whisky for four separate persons is not disputed. Whether in each case he carried the burden which the law imposed upon him of showing to the satisfaction of the jury that the unknown negro from whom he said he bought the whisky was the seller, and that he himself acted simply as a matter of accommodation to the purchasers and as their agent, and had no interest otherwise in the sale, or whether this defense was resorted to as a subterfuge to cover up illegal sales made by himself, or in which he had some interest, were matters to be determined by the jury, and the conclusion at which they arrived seems to have been fully supported by circumstances and reasonable deductions therefrom.

2. The alleged newly discovered testimony is not of such character as would probably produce a different result on a second trial.

Judgment affirmed.

DECIDED DECEMBER 19, 1911.

Accusation of sale of liquor; from city court of Dublin—Judge Hawkins. September 23, 1911.

J. E. Burch, for plaintiff in error.

George B. Davis, solicitor, contra.

3796. HOWE v. THE STATE.

POWELL, J. 1. An accusation, which, following the general language of the statute, charges that the accused "did sell and barter, for a valuable consideration, alcoholic, spirituous, malt, and intoxicating liquors, intoxicating bitters, and drinks which, if drunk to excess, will produce intoxication," is not subject to special demurrer on the ground that the kind of drinks sold is not specified with sufficient definiteness. *Hall v. State*, 8 Ga. App. 747 (70 S. E. 211).

2. The specific point that, since some malt liquors are not intoxicating, the accusation should have expressly shown that the malt liquors referred to therein were intoxicating, is not meritorious. *Stoner v. State*, 5 Ga. App. 716 (63 S. E. 602).
3. The request to review these decisions, for the purpose of having them modified or overruled, is refused.
4. There was no error in the court's instructing the jury as follows:
"On the trial of one charged with having violated the law by illegally selling intoxicating liquors, proof that the accused received money from another person, accompanied with a request to procure whisky for the latter, and shortly thereafter delivered whisky to such person, puts the onus on the defendant of explaining where, how, and from whom he got the liquor; and if the explanation offered by him is supported only by his own statement, the jury, if they believe it to be a mere subterfuge to cover up an illegal sale by himself, are authorized to find the defendant guilty." *Mack v. State*, 116 Ga. 546 (42 S. E. 776).
A request to charge, stating a contrary doctrine, was properly refused.
5. The evidence strongly supports the conviction, and no material error appears.

Judgment affirmed.

DECIDED DECEMBER 19, 1911.

Accusation of sale of liquor; from city court of Fitzgerald—
Judge Wall. September 15, 1911.

Haygood & Cutts, for plaintiff in error.

A. J. McDonald, solicitor, contra.

3797. BROWN v. THE STATE.

- HILL, C. J. 1. On a criminal trial the judge cautioned the jury as to certain testimony which he had admitted in evidence, as follows:
"The evidence of Mr. Killebrew as to certain statements made to him by James Brown can not be considered by you in determining the question of whether or not the defendant is guilty, but can only be considered by you for the purpose of determining whether or not the witness has been impeached." The following portion of this charge, viz.:
"The evidence of Mr. Killebrew as to certain statements made to him by James Brown"—is not subject to the criticism that it was an expression or intimation of opinion by the court as to what had been testified in such case.
2. Where one is charged with a homicide, proof that the homicide as charged was actually committed by him must be clear and unequivocal. Yet this fact can be proved by circumstances, and by inferences reasonably deducible from the facts in evidence, as well as by direct testimony. In this case the evidence was clear that the accused struck the decedent a blow with a deadly weapon, and the jury were authorized, although there was no expert testimony and death did not result until several days thereafter, to find that the homicide was caused by the blow inflicted by the accused with the deadly instrument.

2. No other error is assigned, and the verdict is supported by evidence.
Judgment affirmed.

DECIDED DECEMBER 19, 1911.

Conviction of manslaughter; from Glascock superior court—
Judge Walker. September 28, 1911.

Isaac S. Peebles Jr., for plaintiff in error.

Thomas J. Brown, solicitor-general, contra.

3801. FLANNIGAN v. CITY OF ROME.

Where a city council tries a person for the violation of a municipal ordinance, a judgment of guilty may be rendered by a mere majority vote, unless the charter of the city otherwise provides.

DECIDED DECEMBER 19, 1911.

Certiorari; from Floyd superior court—Judge Maddox. October 16, 1911.

Eubanks & Mebane, for plaintiff in error.

Max Meyerhardt, contra.

POWELL, J. The plaintiff in error, having been convicted in the recorder's court of Rome of the violation of a city ordinance, entered an appeal to the mayor and council, as is provided for by the charter of that city. Before that body the case was heard de novo. Nine members constituted the body; and, at the conclusion of the trial, five voted guilty and four not guilty. Thereupon judgment of guilty was entered up and sentence imposed.

The point here presented is that, by analogy to jury trial, a unanimous vote of the members of the council was essential to a lawful judgment convicting and sentencing the accused. The council was not sitting as a jury, but as a court. A person accused of a municipal offense is not entitled to trial by jury, but to trial by a court. *Loeb v. Jennings*, 133 Ga. 796 (67 S. E. 101). There are many differences between a court and a jury; but one cardinal and very important difference is that unless the law expressly provides to the contrary, a jury can render no finding except by the unanimous assent of all of its members, while, unless the law expressly provides to the contrary, a court adjudges and acts according to the vote of a majority. The point presented is therefore not well taken.

Judgment affirmed.

3814. JORDAN v. THE STATE.

POWELL, J. The defendant was making a statement to the jury, under section 1036 of the Penal Code (1910). Instead of talking about the matter in issue and things relating to the case on trial, he went into a long and rambling statement concerning a number of wholly irrelevant matters. After he had thus been indulged for a great length of time, and while he was speaking of a matter wholly foreign to the issue involved in the case on trial, the judge interrupted him and said to him? "Mr. Jordan, the law allows you great latitude in making your statement; but I can not permit you to go into matters wholly at variance with your case, and not connected with the case. What has cross-ties, or Mr. Simmons, or Christmas dinners, to do with the case? I beg of you to confine yourself to matters connected with the issues involved. At any rate, I do not think it will do your case any good." *Held*, not error. *Judgment affirmed.*

DECIDED DECEMBER 19, 1911.

Accusation of assault and battery; from city court of Houston county—Judge Brunson. October 2, 1911.

Oliver C. Hancock, for plaintiff in error.

R. E. Brown, solicitor, contra.

3836. MCGINTY v. THE STATE.

No error appears.

DECIDED DECEMBER 19, 1911.

Accusation of violation of prohibition law; from city court of Macon—Judge Hodges. October 7, 1911.

John P. Ross, for plaintiff in error.

Walter J. Grace, solicitor-general, contra.

POWELL, J. This is a liquor case, with conviction on the count charging the keeping on hand of liquors at defendant's place of business. While there are a number of assignments of error, all of them, so far as material, are directly controlled adversely to the plaintiff in error by the decisions of this court—most of them so very recent as that it would result in mere idle judicial tautology for us to enter into an elaboration of the points here presented.

Judgment affirmed.

3847. DENNIS *v.* THE STATE.

POWELL, J. While, under a number of decisions of this court and of the Supreme Court, it is error to exclude a witness from testifying because he has remained in the court-room after an order for the sequestration of witnesses has been granted, still it is equally well settled that a ground of a motion for a new trial complaining of such an error must show that the error resulted in injury, which is generally to be shown by a statement of what the complaining party expected to prove by the witness.

Judgment affirmed.

DECIDED DECEMBER 19, 1911.

Accusation of carrying pistol without license; from city court of Monticello—Judge Thurman. September 14, 1911.

Eugene M. Baynes, for plaintiff in error.

Greene F. Johnson, solicitor, contra.

3856. COOK *v.* THE STATE.

POWELL, J. This court has no jurisdiction to review issues of fact.

Judgment affirmed.

DECIDED DECEMBER 19, 1911.

Indictment for assault and battery; from Fannin superior court—Judge Morris. October 28, 1911.

A. S. J. Hall, *Tain Smith*, *J. Z. Foster*, for plaintiff in error.

J. P. Brooke, solicitor-general, contra.

3161. BAUMGARTNER *v.* MCKINNON, administrator.

1. "The appointment of a temporary administrator does not constitute 'representation' upon the estate of a decedent, within the purview of the Civil Code (1910), § 4376, which provides that 'the time between the death of a person and representation taken upon his estate . . . shall not be counted against his estate, provided such time does not exceed five years,' so as to cause the statute of limitations to begin to run against the estate upon the appointment of such temporary administrator." *Baumgartner v. McKinnon*, 137 Ga. 165 (73 S. E. 518).
2. "As a general rule, the debtor has a right to appropriate payments; if he does not, the creditor may. If neither does, the jury will make the application under the direction of the court." *Newton v. Nunnally*, 4 Ga. 357; Civil Code (1910), § 4316. A surety can not claim a release from liability to pay a promissory note which he indorsed, upon the ground that the payee, who was also the payee of notes junior in date

and maturity, executed by the same maker, failed to apply payments made by the principal debtor (without direction as to their application) to the oldest note. All of the obligations of the principal debtor being ordinary promissory notes indorsed by different parties, and none of them creating any lien, there was nothing to affect the creditor's statutory right under the foregoing section of the code.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Brunswick—Judge Krauss. October 29, 1910.

It appears from the record that P. W. Fleming borrowed \$500 from John A. Ward, and gave therefor a promissory note, dated February 6, 1903, and due one year after date, with interest from date at the rate of eight per cent. per annum. The note was indorsed by B. A. White Jr., M. Elkan, and Fred Baumgartner. On May 1, 1903, Fleming borrowed \$200 from Ward on his (Fleming's) note indorsed by George R. Krauss, and \$300 on his (Fleming's) note indorsed by R. R. Hopkins and C. D. Ogg. Both of these latter notes fell due May 1, 1904. Thus Fleming owed Ward \$1,000 in all (exclusive of interest), payable in three notes, each indorsed by different parties. So far as appears, Fleming paid Ward nothing until March 2, 1906, when a payment of \$80 was made, and this was followed by various other payments, up to the death of the creditor, aggregating \$736.60, and one payment of \$5 credited upon the note after the death of the intestate. Of these payments \$217.50 only was applied toward the satisfaction of the note indorsed by White, Elkan, and Baumgartner, and on April 12, 1910, suit was instituted for the remainder of the debt evidenced by this note. Neither Fleming nor White filed a defense. Elkan was not served, and Baumgartner alone set up a defense.

Baumgartner pleaded that he was only an accommodation indorser, or guarantor, on the note, and had heard nothing about it from the time he indorsed it (February 6, 1903) up to the time he was served with copy of the suit, and he naturally supposed it had long since been paid. He further alleged that, Fleming having borrowed the \$500 on the two notes as stated above, and having paid Ward in all \$741.60 on his general indebtedness, it was the duty of Ward to apply all of the payments to the note indorsed by himself, it being the oldest item in Fleming's indebtedness; that the note would thereupon have been paid; whereas, as he alleged, Ward credited the note indorsed by Hopkins and Ogg with \$334.50, and the note indorsed by Krauss with \$189.60, and only credited the

note indorsed by the defendant with \$217.50; that this act of the creditor injured him, Baumgartner, as a security on the note, and increased his risk thereon, and exposed him to greater liability, and he was thereby discharged. The court struck this portion of the plea, and exception is taken to this ruling.

It was further pleaded that the note was barred by the statute of limitations, for the reason that when the suit was filed, more than six years had elapsed since the maturity of the note; that on April 23, 1909, a temporary administrator was appointed, with authority to bring suit upon the note, and his failure to bring suit caused the bar of the statute to attach. According to the evidence, the plaintiff's intestate died April 16, 1909, and no permanent letters of administration were granted until July 7, 1909, but temporary letters of administration were granted on April 23, 1909.

The court (trying the case without a jury) found against the plea of the bar of the statute of limitations, and rendered judgment against the defendant surety along with the other defendants. He excepted to this judgment.

R. D. Meader, for plaintiff in error.

H. F. Dunwody, contra.

RUSSELL, J. (After stating the foregoing facts.)

Inasmuch as a finding in favor of the defendant upon the plea of the statute of limitations would have worked a total disposition of the case, regardless of the ruling upon the plea of release, and in view of the fact that this court requested the instruction of the Supreme Court upon that branch of the case, we shall consider in inverse order the defenses presented by the pleas. The decision of the Supreme Court, in answer to the certified question, disposes of the plea of the statute of limitations, and sustains the final judgment of the trial judge, unless the judge erroneously struck that portion of the plea wherein the defendant attempted to set up his release as surety; and it is only upon this phase of the case that this court will be called to pass.

1. The question certified to the Supreme Court was as follows: "Does the appointment of a temporary administrator constitute 'representation' upon the estate of the decedent, within the purview of Civil Code (1910), § 4376, which provides that 'the time between the death of a person and representation taken upon his estate . . . shall not be counted against his estate,' for the pur-

poses of the statute of limitation of actions? In this connection counsel for plaintiff in error has requested the right to review the decision of the Supreme Court in the case of *Scott v. Atwell*, 63 Ga. 764, for the purpose of having the same modified or overruled." And the instruction is contained in the following opinion, delivered by Justice Lumpkin:

"It is true that the code declares that a temporary administrator may sue to recover debts due the estate (Civil Code (1910), § 3937); and upon the general analogy of the law that where a person has the capacity to sue, and fails to exercise the right, the statute of limitations will run against him, an argument may be based that, on account of the provision of this section, the right and duty are correlative, and the statute runs against the estate. But, on the other hand, the section of the code to which reference has been made arose, not from legislative enactment, but from the codification of the decision in *Ewing v. Moses*, 50 Ga. 264. The decision in that case was rendered before the one in *Scott v. Atwell*, 63 Ga. 764. The opinion in the case last cited expressly referred to the fact that the court had held that temporary administrators had the right to sue in certain cases, but nevertheless construed the statute suspending the running of the statute of limitations against an estate until 'representation taken,' provided the time elapsing was not greater than five years, to refer to the grant of permanent letters. The members of the court doubtless had before them the decision in the 50 Ga., supra, as well as other cases, at the time this construction was placed upon the statute; and we do not think that the codification of the decision in the 50 Ga., and the adoption of the code containing that provision, is sufficient to change the ruling thus made.

"A temporary administrator occupies a somewhat peculiar position. He is appointed to act only until a permanent administrator is appointed, for the purpose of collecting and taking care of the effects of the deceased; and from the order appointing him no appeal is allowed. Civil Code (1910), § 3935. By the Civil Code (1910), § 3936, he is required to give a bond for double the amount of the personal property; but it has been held that no action can be brought on the bond until the appointment of a permanent administrator. *Webster v. Thompson*, 55 Ga. 431. His duties are principally of preservative character. *Banks v. Walker*, 112 Ga.

542; *Neal v. Boykin*, 129 Ga. 676, 682 (59 S. E. 912, 121 Am. St. R. 237). A permanent administrator is required to give bond in a sum equal to double the amount of the estate to be administered. Civil Code (1910), § 3972. A temporary administrator may take steps with a view of collecting and preserving the estate, including certain litigation; but he is not clothed with the full power of a permanent administrator. Thus, he can not sue for the recovery of land. *Banks v. Walker*, supra. He can not distribute the estate; nor will notice to him of an application for dower be sufficient. *Langford v. Langford*, 82 Ga. 202 (8 S. E. 76). Section 3997 of Code of 1910 declares that an administrator shall be allowed twelve months from the date of his qualification to ascertain the condition of the estate and that creditors failing to give notice within that time lose all rights to an equal participation with creditors of equal dignity to whom distribution is made before notice of such claim is brought to the administrator. Evidently this did not contemplate a temporary administrator, who has no right to make any distribution. The language of the Civil Code (1910), § 4377, touching the suspension of the statute in favor of an estate, is the same as that relating to the running of the statute against it. If the estate could practically be wound up by litigation pro and con with a temporary administrator, and the statute of limitations be applied to such administrator as well as to a permanent one, section 3997 would be of little avail to the estate. Moreover, a judgment against an administrator is conclusive evidence that he has in his hands assets of the decedent, if he fails to plead *plene administravit* or *plene administravit præter*. Neither of these pleas could be filed by a temporary administrator. It will thus be seen, that, comparing the functions of a temporary administrator with those of a permanent administrator under the statutes of this State and the decisions construing them, it would produce much confusion and conflict to hold that the estate should be barred by the omission of the temporary administrator to sue.

"The ruling announced in the first headnote follows the decision in *Scott v. Atwell*, 63 Ga. 764; and that decision answers the question propounded by the Court of Appeals, unless, upon review, it is overruled or modified by this court. Upon request of counsel, the Court of Appeals has certified the question to this court, so that application may be made for such a review. The decision mentioned

was rendered in 1879, and has stood unquestioned from that time until the present. Upon a review of it, we decline to modify or overrule it."

2. As to whether the action of Ward, in failing to credit all of the payments made upon the general indebtedness due him by Fleming and evidenced by the three notes to which we have referred (in the absence of any direction upon Fleming's part as to the application of the payments), effected a release of Baumgartner as a surety, it is contended by learned counsel for the plaintiff in error that though, ordinarily, a creditor, in the absence of instruction or direction from the debtor, has the right to apply payments made to him, as he may see fit, to any one or more of different obligations due him by the same debtor, still this rule is varied where the rights of others are affected, and the creditor in this case should have applied a larger proportion of the payments made by Fleming, if not all, to the note indorsed by Baumgartner. The cases of *Cofer v. Benson*, 92 Ga. 794, *Newton v. Nunnally*, 4 Ga. 356, *Rushin v. Shields*, 11 Ga. 636 (56 Am. Dec. 436), *Simmons v. Cates*, 56 Ga. 609, *Hughes v. Johnson*, 38 Ark. 285, and *Jones on Chattel Mortgages*, § 640, are cited in support of the principle that the rights of third persons must be considered by a creditor in making application of payments made by his debtor. It is further insisted that the intention of the parties, in making the payments, is a question for a jury to pass upon, and that in rendering his judgment the court did not give effect to this circumstance, as required by the ruling in *Pritchard v. Comer*, 71 Ga. 18. In the case last cited it was held, that when the debtor fails to make a direction as to how payments shall be applied, and the creditor applies the payments to suit himself, the question of intention in making the payments should be submitted to the jury; but in that case there were circumstances developed from the very nature of the transaction itself which evidenced the intention of the parties, and which the Supreme Court held was "equivalent to a direction of the application of the money." Justice Blandford, in making this ruling, said: "To hold otherwise would operate as a fraud upon . . . the indorser, as he made this indorsement with full knowledge that his principal had made the mortgage to secure the payment of the fifteen hundred dollar note upon which he gave his indorsement." In the case now before us there is no evidence of any kind to indi-

cate an intention on the part of Fleming, who made the payments, that these payments should be applied to any one of the notes in preference to the other; and so the point seems to be without merit. We do not think there is anything in the allegations of the plea which would take the case out of the general rule which gives a creditor the right to apply payments as he sees fit, in the absence of a direction on the part of the debtor as to how the payments should be applied. Certainly no reason is found in the statement that the other notes held by Ward were junior in date to the one which Baumgartner indorsed, nor in the fact that the amount of both of these later notes only equaled the first one. Even if Ward had applied to the junior notes all of the payments made by Fleming, this would not have been such an act, within the contemplation of the law, as injured the surety, Baumgartner, or increased his risk, or exposed him to greater liability, so as to discharge him.

Section 4316 of the Civil Code (1910), relating to the application of payments, is as follows: "When a payment is made by a debtor to a creditor holding several demands against him, the debtor has a right to direct the claim to which it shall be appropriated. If he fails to do so, the creditor has the right to appropriate at his election. If neither exercises this privilege, the law will direct the application in such manner as is reasonable and equitable, both as to parties and third persons. As a general rule, the oldest lien and the oldest item in an account will be first paid, the presumption of law being that such would be the fair intention of the parties." As we construe this section, its latter portion imposes no limitation on the right of either of the parties, as previously stated, if either has exercised the option conferred by law, the debtor having first the privilege of directing the application of the payment he makes; for the direction by law occurs only "if neither exercises this privilege." Of course, where a fund is brought before the court for distribution according to law, and it is discovered that by reason of a legal priority the rights of a third person are involved and are superior to those of the creditor who has received a payment, the previous disposition of that fund, whether it has been applied upon the creditor's demand at the instance of the debtor, or, in the absence of such direction, by the creditor himself, becomes immaterial, and the provisions of § 4316 have no application to the case. As was said by Judge Lumpkin in *Newton v. Nunnally*, 4 Ga. 357:

"As a general rule, the debtor has a right to appropriate payments; if he does not, the creditor may. If neither does, the jury will make the application under the direction of the court." And as that was a case in which priority of liens was involved, Judge Lumpkin quoted from Chief Justice Marshall in *Rankin v. Scott*, 12 Wheaton, 177 (6 L. ed. 592): "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to satisfaction."

In all of the cases cited by counsel for the plaintiff in error it appears that there was outstanding some superior lien, in the hands of some third party, which was entitled to a priority over the indebtedness to which it was sought to apply the payment in question; and as the answer of the defendant, which was stricken, distinctly states that "in making said payments to said Ward said Fleming paid them on his general indebtedness, which consisted of said three notes aforesaid, and did not advise or request that same be applied to any particular note," it is manifest that these decisions have no bearing, but that the case is rather controlled by the provisions of § 4316 of the Civil Code. The note that Baumgartner indorsed had no superior right to the money paid by Fleming which would, under the law, have required its application to that note rather than to the other two notes, which Baumgartner had not indorsed. When Fleming did not direct the application of the payments, Ward had the right to apply them as he pleased.

So much of the defendant's plea as attempts to set up the defense that the plaintiff was guilty of laches, in that he did not bring suit earlier, and thereby increased the risk of the surety, was properly stricken, because there was no allegation that there was a consideration for the postponement, nor an averment that the security had given a written notice to sue. Under the ruling in *Thomas v. Clarkson*, 125 Ga. 78, 79 (3), (54 S. E. 77, 81, 6 L. R. A. [N. S.] 658): "the surety could not, at common law, be discharged by failure of the payee to sue, and the plea setting up such defense was necessarily without merit." "A mere failure by the creditor to sue as soon as the law allows, or negligence to prosecute with vigor his legal remedies, unless for a consideration, will not release the surety." Civil Code (1910), § 3544.

There was plainly no merit in the stricken defenses; and the answer of the Supreme Court to the certified question, and its affirm-

ance, upon review, of the decision in *Scott v. Atwell*, 63 Ga. 764, sustains the judgment of the lower court.

Judgment affirmed.

3163. SMITH *v.* SEABOARD AIR-LINE RAILWAY.

1. A rule or regulation promulgated by the railroad commission of this State relating to the reception of passengers by railroad companies and the keeping open of their depots and stations, must be presumed to be just and reasonable; and whether such a rule or regulation is reasonable or not is a question of law.
2. The fact that a rule prescribed by the railroad commission, for the conduct of the railroad companies with reference to the keeping open of their depots and stations and the reception of passengers therein, may in a particular case result in hardship or injury is not a criterion by which to test the reasonableness of the rule. If the rule conduces to the interest of the railroad company and works no hardship upon the traveling public generally, it must be considered as reasonable.
3. A person coming to a railroad station with the intention of taking the next train is, in contemplation of law, a passenger, provided his coming is within a reasonable time before the departure of the train.
4. Rule number 10 of the railroad commission of Georgia, which provides, that "At junction points railroad companies shall be required to open their depot waiting-room, for the accommodation of the traveling public, at least 30 minutes before the schedule time of the arrival of all passenger trains. At local or non-junction points all such waiting-rooms shall likewise be opened, provided that the same shall not be required to be opened, nor kept open, after 10 o'clock p. m., except for delayed trains due before that hour, in which case such rooms shall be kept open until the actual arrival of such delayed trains," is reasonable; and one who comes to the depot for the purpose of taking a train is not a passenger unless his coming is within the limitations of the rule.
5. The allegations of the petition, construed in the light of the above-quoted rule, set up no cause of action, and the trial judge properly sustained the demurrer and dismissed the petition.

DECIDED JANUARY 15, 1912.

Certiorari; from Liberty superior court—Judge Seabrook. December 3, 1910.

Suit in the county court was brought against the Seaboard Air-Line Railway, to recover damages for a tort. The court sustained a general demurrer to the petition. On certiorari, the superior court affirmed the judgment; and the judgment of the superior court is here for review.

The petition makes in substance the following case: At 8 o'clock

at night the petitioner, in company with two other persons, went to the railway station at Riceboro, Georgia, for the purpose of becoming a passenger on the Seaboard Air-Line Railway train going to Savannah and due at Riceboro at 10 minutes after 10 o'clock that evening. The night was extremely cold, and the waiting-room at the station was well heated by a large fire, and the petitioner and her friends went into this room. The train due to arrive at 10.10 o'clock was delayed, and did not arrive until 1.15 o'clock that morning. A little after 9 o'clock the station agent, acting within the scope of his authority in the discharge of his official duties, notified the petitioner and her friends that it was time for him to go home, and he closed the station, and they could not remain in the waiting-room. The petitioner informed him that they intended becoming passengers on the train for Savannah, and protested against being turned out into the cold, and begged the agent, if he must close the office, to permit the waiting-room to remain open, so they could stay therein and be comfortable while waiting for the arrival of the delayed train. This request he refused, and put the petitioner out into the cold. As there was no other shelter she was compelled to remain out in the cold from 9 o'clock to 1.15 o'clock a. m. This exposure to cold made her ill. She contracted a severe cold which compelled her to go to bed, where she suffered greatly from aches and pains in her chest and from annoyance attendant upon the cold. She alleges, that under the circumstances detailed above, she had a right to remain in the station-room until the overdue train arrived; that the defendant owed her the duty to permit her to remain therein, where it was warm and comfortable, and that, through its employee, it violated its direct duty to her in denying her the legal right to remain in the waiting-room, where comfort was already provided, and in compelling her to vacate this room and to go out in the intense cold, resulting in the personal injuries narrated. She left the waiting-room only under the order and demand of the station agent, and, after doing so, did everything in her power to protect herself from the cold, and in no way consented or contributed to her injuries. She charges that her injuries were directly and proximately due to a breach of duty on the part of the defendant. She sues for damages for a breach of the public duty which the railway company owed to her as a passenger, which resulted in the personal injuries above set out. She charges

also that the action of the agent was wilful and wanton, in utter disregard of her rights, and she seeks also to recover punitive damages.

In support of a demurrer the railway company relied upon rule No. 10 of the railroad commission of Georgia, of which the courts take judicial cognizance, and which is as follows: "At junction points railroad companies shall be required to open their depot waiting-room, for the accommodation of the traveling public, at least 30 minutes before the schedule time of the arrival of all passenger trains. At local or non-junction points all such waiting-rooms shall likewise be opened, provided that the same shall not be required to be opened nor kept open after 10 o'clock p. m., except for delayed trains due before that hour, in which case such rooms shall be kept open until the actual arrival of such delayed trains." It is insisted that under this rule there was no duty upon the railway company to open or heat its waiting-room at the hours stated in the petition when the plaintiff entered the waiting-room and when she was directed to leave by the station agent, for the reason that the train which she intended to take was scheduled to arrive after 10 o'clock p. m.

The plaintiff insists that this rule is unreasonable and void, and consequently that the company would not be protected under its provisions; that even if valid, it is not applicable in the present case, for the reason that, the company having heated and opened its waiting-room and having received therein passengers intending to take a train scheduled to arrive after 10 o'clock p. m., the provisions of the rule were waived; that at common law it is the duty of a railway company to provide a comfortable waiting-room for its passengers a reasonable length of time before the arrival of its trains; that it was beyond the power of the railroad commission of Georgia to change the common law by the promulgation of a rule, and that, irrespective of the rule, the railroad company owed a common-law duty to the plaintiff, which it violated, and for which a recovery may be had; since there is no legislative action changing the common-law duty.

Twiggs & Gazan, for plaintiff, cited: Civil Code (1910), § 2727; *Riley v. W. & T. R. Co.*, 133 Ga. 417; *Phillips v. Southern Ry. Co.*, 124 N. C. 123 (32 S. E. 388, 45 L. R. A. 163); *Coleman v. Southern Ry. Co.*, 50 S. E. 692; *International & G. N. R. Co. v. Doo-*

lan (Tex. Civ. App.), 120 S. W. 1122; 2 Hutchinson, Carriers, § 931; 2 White, Pers. Inj. on Railroads, § 622.

Anderson, Cann & Cann, T. F. Walsh Jr., for defendant, cited: *Page v. R. Co.*, 129 Ala. 232 (29 So. 676); 26 A. & E. Enc. L. (2d ed.) 492 (2), and cit.; Civil Code (1910), §§ 2630, 2664; *A., B. & A. R. Co. v. Emanuel*, 6 Ga. App. 319; *So. Ry. Co. v. Atlanta Stove Works*, 128 Ga. 207 (3), 217; *Central Ry. Co. v. Motes*, 117 Ga. 923; *Brown v. G., C. & N. Ry. Co.*, 119 Ga. 88; 4 Elliott, Railroads, § 1579, pp. 381-2; *L. & N. R. Co. v. Commonwealth* (Ky.), 43 S. W. 458; *Louisville &c. Ry. Co. v. Wright* (Ind. App.), 47 N. E. 491; *Northern Pacific R. Co. v. Territory of Washington*, 142 U. S. 492 (35 L. ed. 1092); *McDonald v. Chicago &c. R. Co.*, 26 Iowa (96 Am. Dec. 114); *Caterham Ry. Co. v. London &c. R. Co.*, note in 1 Ry. Cas. 32, and cases cited supra for plaintiff.

HILL, C. J. (After stating the foregoing facts.) The basis of liability for negligent torts is breach of duty, and in this case the railroad company is sued for damages for a breach of its public duty as a carrier of passengers. If the railroad company, under the allegations in the petition, owed the plaintiff a duty which was violated, and without any fault on her part damage resulted to her, she would have a right to recover. Did the railroad company owe her any duty? Learned counsel for the plaintiff contend that at common law it was the duty of railroad companies to provide comfortable waiting-rooms for passengers, a reasonable length of time before the arrival of trains. Learned counsel for the defendant insist that this was not so at common law; that under the common law, railroad companies were under no duty to maintain comfortable waiting-rooms at their stations for persons purposing to become passengers. There is authority for both contentions, and the weight of authority is in favor of the latter proposition. This is immaterial, however, for in this State, in so far as cities of a thousand inhabitants are concerned, the statute makes it the duty of railroad companies operating passenger-trains to have station accommodations for passengers, and to keep them open at least one hour before the arrival and a half hour after the departure of trains, according to the scheduled time for arrival and departure, and to keep the waiting-room lighted and comfortable between the hours of 6 o'clock a. m. and 6 o'clock p. m., for the comfort and convenience of passengers. Civil Code (1910), § 2727. This statute law

applies only to towns and cities of more than a thousand inhabitants. The law of this State, however, as declared by the Supreme Court, makes it the duty of railroad companies to provide accommodations at their stations for passengers, and makes them liable for such damages as proximately flow from a violation of this duty. In *Brown v. Georgia, Carolina & Northern Railway Company*, 119 Ga. 90, Mr. Justice Lamar announces the general rule on this subject as follows: "Railroad companies are bound to provide reasonable accommodations at their stations for passengers who are invited to travel on their roads; and will be liable for such damages as proximately flow from a violation of this duty. The character of the accommodations required, of course, varies with the amount of business done at a particular point; and the company might be relieved altogether of the obligation to furnish depots at flag-stations, or points where trains stop for the accommodation of occasional travelers. But even where waiting-rooms are maintained, the company is only required to keep them open for a reasonable time before and after the departure of trains." The learned Justice cites a number of authorities in support of this proposition. It can not be doubted that the railroad company was under a duty to keep open and in a comfortable condition the waiting-room at Riceboro, for the comfort and convenience of passengers.

Was the plaintiff in this case a passenger when she was turned out of the waiting-room by the agent of the defendant? If she was, the railroad company owed her extraordinary diligence in taking care of her. If she was not, the defendant owed her no duty in connection with the waiting-room. Elliott, in his admirable work on Railroads, lays down the true rule for determining whether or not the plaintiff was a passenger, under the allegations of her petition. In volume 4, section 1579, he uses the following language: "We think it safe to say that a person becomes a passenger when, intending to take passage, he enters a place provided for the reception of passengers, as a depot, waiting-room, or the like, at a time when such a place is open for the reception of passengers intending to take passage on the trains of the company." And he cites many decisions in the notes, in support of this general rule. To this general rule, however, he makes the following material qualification: "Where, however, by reasonable rules or regulations a railroad company designates the times at which places will be ready for the re-

ception of passengers, a person can not become a passenger by entering such places in violation of the rules, or at an unreasonable time." He cites many authorities in support of this qualification to the general rule. As stated by the Supreme Court in the case of *Riley v. W. & T. Railroad Co.*, 133 Ga. 417 (65 S. E. 890, 24 L. R. A. (N. S.) 379), "a person going to a station has no absolute right to require the waiting-room to be kept open and in comfortable condition for passengers an unreasonable length of time before that fixed for the departure of the train, nor to use the room for lying down and sleeping." The Supreme Court of North Carolina, in *Phillips v. Southern Ry. Co.*, 124 N. C. 123, announces the general rule with a qualification, as follows: "A person coming to a railroad station with the intention of taking the next train is in contemplation of law a passenger, provided his coming is within a reasonable time before the departure of the train."

Was the plaintiff, under the allegations of the petition, a passenger a little after 9 o'clock, when she was turned out of the waiting-room by the station agent? It is wholly immaterial to consider whether she was a passenger when she went to the station at 8 o'clock and went into the waiting-room; for the time when her rights should be determined is the time when she was deprived of the privilege and comforts of the waiting-room, and not when she first entered into it. The train which she intended to take was due at 10.10 p. m. She was in the waiting-room, intending to be a passenger, about one hour before the train was due, according to its schedule. In the absence of any express rule on the subject by the railroad company, or by the railroad commission of this State, we would be inclined to hold that she was in the waiting-room at a reasonable time before the arrival and departure of the train on which she intended becoming a passenger; at least, that the question should be determined by the jury. But the railroad commission of Georgia has promulgated a rule exactly in point, and this rule provides that railroad companies shall only be required to open their depot waiting-rooms for the accommodation of the traveling public at least 30 minutes before the schedule time for the arrival of passenger-trains. Under this rule the railroad company was not required to open its waiting-room at Riceboro for the accommodation of passengers until 30 minutes before the arrival of the train, which was due at 10.10 p. m. It was immaterial that it

opened the waiting-room before that time. That was a mere voluntary act on its part. The rule provides further that the railroad company shall not be required to open or keep open its waiting-room after 10 o'clock p. m., except for delayed trains due before that hour. The train in this case was delayed, but it was not scheduled to arrive before 10 o'clock. It was scheduled to arrive at 10 minutes after 10 o'clock. Therefore, it was not within the terms of this rule. We are compelled to conclude that the petitioner was not a passenger when she was turned out of the waiting-room by the station agent.

It is insisted by counsel for the plaintiff that without any reference to the rule promulgated by the railroad commission on the subject, the railroad company as a matter of fact had its waiting-room open and warm and comfortable at 8 o'clock, when the plaintiff came to the station for the purpose of becoming a passenger, and she was received into the room by the company, and that this conduct amounted to a waiver of the conditions and terms of the rule, that having received her into the room, it had no right subsequently to turn her out into the cold, knowing that she intended to take passage on the delayed train, and that in doing so, it was guilty, through its agent, of a wilful and wanton tort. There is no allegation in the petition that the station agent knew at what hour she came into the station-room, or for what purpose she had entered, until he went to her a little after 9 o'clock and told her that he must close and she must get out. Of course, it can not be said that railroad companies receive every person who goes into their waiting-rooms at unreasonable times, as passengers. She had no right in the waiting-room as a passenger until she went there at the time when, under the rules, it was the duty of the company to keep open the waiting-room for the accommodation of passengers.

Was the rule relied upon by the railroad company and promulgated by the railroad commission a reasonable rule or regulation on the subject? Whether a rule or regulation of the character in question is or is not reasonable is to be determined as a matter of law by the court. *Central Ry. Co. v. Motes*, 117 Ga. 923 (43 S. E. 990, 62 L. R. A. 507, 97 Am. St. R. 223) ; 1 Elliott on Railroads, § 199. And especially is this true where, as in this State, the rules and regulations are intrusted by the legislature to the wisdom of the railroad commission. Every presumption must be indulged in

favor of the reasonableness of a rule or regulation prescribed by the railroad commission. A rule or regulation of the railroad commission relating to passengers, or to the reception of passengers at depots or elsewhere, should be manifestly unjust to the general public, and its enforcement a hardship to the traveling public, or to the railroad company, before it should be declared unreasonable.

The fact that the rule worked a hardship in a particular or individual case, under the peculiar facts of that case, is not a criterion by which to judge of its reasonableness. In this case, according to the allegations of the petition, the operation of the rule resulted in great discomfort and injury to the plaintiff. It seems to us that this hardship might have been avoided or greatly alleviated by the exercise of some discretion on the part of the agent of the railroad company. In view of the circumstances, it would have been a wise exercise of discretion on the part of this agent to have permitted the plaintiff to remain in the station-room; but the rule did not require him to do so, and his obedience to the rule, although it resulted in hardship and damage to the plaintiff, was not such a tort on his part as would make the company responsible. Certainly it can not be said that railroad companies are required to keep their waiting-rooms open all night for the reception of passengers at stations of the character of Riceboro. They could only be expected and required to keep their station open a reasonable length of time before and after the departure of trains. In the case of *Central Ry. Co. v. Motes*, supra, Mr. Chief Justice Simmons says: "It seems reasonable to assert that a railway company could not be considered unreasonable if it adopted a regulation whereby a passenger was not admitted to its waiting-room until an hour or so before the departure, on schedule time, of a train the passenger desired to take. Nor would it appear more unreasonable for the carrier to actually keep its waiting-room open all night for the accommodation of its patrons, permitting them to enter it at any time they choose." But it would be profitless to extend the discussion. The rule or regulation in question has been prescribed by the railroad commission of this State, and no reason is shown why the rule, in its operation as regards the business and interest of the railroad company and the convenience and comfort of the general public, is not a reasonable rule; and this court, although in the

particular case the operation of the rule may have worked a hardship, is not willing to condemn a rule as unreasonable which has been promulgated by the railroad commission presumably with due regard to the interest of both the railroad company and the traveling public. We therefore hold that the court did not err in sustaining the demurrer and dismissing the petition.

Judgment affirmed.

RUSSELL, J., dissenting. With all due respect to the rule of the railroad commission, and without being prepared to declare unreasonable the rule which permits railroad companies to close their offices and waiting-rooms in towns of less than 1,000 inhabitants at 10 o'clock p. m., except for delayed trains which are due before that hour, and leaving entirely out of consideration the fact that in the particular case the train was due to arrive only 10 minutes after 10, I feel compelled to dissent from the opinion of the majority of the court in this case.

It is plain to me, from the allegations of the petition, that the defendant, by the conduct of its agent, waived the rule in this case. He knew, or by the exercise of ordinary diligence could have known, that the plaintiff was intending to take passage on the train to Savannah; and as it is alleged in the petition that the train was not expected to arrive until a quarter past one, he knew also that the train was several hours behind time. Therefore, to my mind, the keeping open of the waiting-room in the earlier portion of the night was an invitation to the plaintiff to use the waiting-room; and the case does not differ materially from that of *Riley v. W. & T. Railroad Co.*, 133 Ga. 413 (65 S. E. 890, 24 L. R. A. (N. S.) 379), where the agent of the railroads invited the plaintiff to enter, and thereafter forced her to leave the waiting-room. See the opinion in that case, pages 417-418, and *Phillips v. Southern Railway Co.*, 124 N. C. 123 (32 S. E. 388, 45 L. R. A. 163). To my mind the entry of this plaintiff into the depot (which must be construed to have been permitted by the company's agent, because the depot was warmed and lighted, and because it is the duty of the agent to know who is in the depot) constituted her a passenger; and a tacit invitation was equivalent to the express invitation set forth in the *Riley* case. The conduct of the agent implied a promise that in this instance the rule which permitted the railroad company to close the office would be waived for her benefit.

Furthermore, in my opinion, the railroad company owed the plaintiff a common-law duty irrespective of the rule. It is the duty of a railroad company to provide a comfortable waiting-room for its passengers a reasonable length of time before the arrival of trains. *International & G. N. R. Co. v. Doolan* (Tex. Civ. App.), 120 S. W. 1118. The defendant railroad company having received Mrs. Smith in its waiting-room, which was heated and lighted, and thereby waived the regulation of the railroad commission in its favor, thereafter violated its common-law duty in not providing a comfortable place for the passenger while waiting for her train, irrespective of the railroad commission's rule. Any other rule, in my opinion, would, in many instances, enable railroad companies, where trains are delayed, to take advantage of their own wrong. We have been unable to find a copy of Sayles' Annotated Civil Statutes of 1897, so as to examine the statute cited in the case last cited; but we can fairly determine its contents by the reference made to it in the decision. In fact, it is stated in the tenth headnote of the decision that that article requires carriers to keep passenger stations warm for at least one hour before and after the departure of trains, and yet it is stated in the eleventh headnote that it is the duty of carriers to keep their passenger stations comfortably heated during all the time passengers are reasonably authorized to use the same, irrespective of the statute. Upon the authority of that case, as well as in view of the natural inference arising from the ruling in the *Riley* case, *supra*, it seems to me that the plaintiff in the present case suffered an actionable wrong when she was ejected from the railroad station after being tacitly invited to occupy it, and that if she was damaged by being exposed at night to the rigors of winter in a place where she could not obtain a shelter, the carrier is liable for these damages.

3200. *HORKAN v. EASON.*

HILL, C. J. 1. Where the seller of personal property takes from the purchaser a purchase-money mortgage on it, which is duly recorded, and subsequently the purchaser, without having paid the mortgage, is adjudged a bankrupt, and his trustee in bankruptcy seizes and sells the mortgaged property, *held*, that the purchaser at the bankruptcy sale takes the property subject to the purchase-money mortgage, unless the

bankruptcy court, after hearing, on due notice, ordered a sale of the property divested of liens.

2. Mere irregularities do not expose an execution sale to collateral attack.
 3. Under the agreed statement of facts, the court properly found in favor of the defendant.
- Judgment affirmed.*

DECIDED JANUARY 15, 1912.

Trover; from city court of Tifton—Judge R. Eve. February 4, 1911.

Shipp & Kline, L. L. Moore, for plaintiff.

R. D. Smith, for defendant.

3209. ROBINSON & JOHNSON *v.* ROTHCHILDS & CO.

1. Assignments of error which do not direct attention to the specific error of which complaint is made will not be considered. An assignment of error as to an instruction to the jury not erroneous in the abstract must point out its specific defect. A mere general assignment that a portion of it is error presents nothing for the consideration of a reviewing court, except as to its abstract correctness; and especially is this true when the charge as a whole is not embodied in the record.
2. The evidence authorized the jury to infer a rescission of the contract, and likewise supports the conclusion that the purchasers of the piano were possessed of sufficient information to give them notice that the piano was not the property of the defendant in attachment.

DECIDED JANUARY 15, 1912.

Trover; from city court of Monroe—Judge Stone. January 24, 1911.

Napier & Cox, for plaintiffs in error.

W. O. Dean, contra.

RUSSELL, J. Rothchilds & Company sold a piano to W. H. Jackson on the instalment plan. Jackson was in arrears in his monthly payments, and correspondence between the sellers of the piano and himself ensued. He several times offered to return the piano, stating that it was not such an instrument as he thought it was when he made the contract, and also that on account of the altered state of his financial condition, he was unable to pay for it. The correspondence resulted in Jackson's final agreement, acquiesced in by Rothchilds & Company, to ship the piano back to them, forwarding them at the same time a bill of lading from Monroe, Ga., to the factory at Stegar, Ill. Jackson himself was in Athens, but he testified by interrogatories that he gave instructions to his wife

to have the piano shipped, and she obeyed his instructions by employing a man to box and pack the piano, and had it carried by a drayman to the railroad depot. There the piano was levied upon under attachments issued at the instance of the plaintiffs in error and other creditors of Jackson. Prior to the levy the constable had been told by Mrs. Jackson at her house that they had been unable to pay for the piano in accordance with the contract, and that it was not Jackson's property, but was the property of the original vendors. No notice of the levy of the attachment was given to Rothchilds & Company, and in due course the piano was sold, the plaintiffs in error being the purchasers. Some time later an agent of Rothchilds & Company, on inquiring as to the whereabouts of the piano, and on being told by Jackson that he had returned it, discovered that it had been seized under the attachments and sold, and thereupon Rothchilds & Company instituted the present action of trover. Upon the trial the jury found in favor of the plaintiffs. Exception is taken to the judgment overruling a motion for a new trial.

1. The motion for new trial is based upon the general grounds, and upon three additional grounds, which attempt to assign error upon certain quoted excerpts from the charge of the court, but there is no specific assignment of error in any of these grounds, and each is so incomplete as to have presented nothing for the consideration of the lower court in passing upon the motion. Under well-settled rulings of the Supreme Court and of this court, these grounds, of course, present nothing for our consideration; for a court of review can not pass upon anything which the lower court did not have fair opportunity to determine. The mere quotation of an extract from the charge of the court, and the general statement that it is error, is an exception so extremely vague and indefinite as to be fatally defective; and especially is this true in a case in which the charge of the court as a whole is not embodied in the record so as to enable us to have the opportunity of considering the extract in connection with the context. It is manifest that this court can not determine from these extracts from the charge whether the judge erred in overruling the motion for new trial, in so far as it was based upon the grounds relating to them. Assignments of error which do not direct the attention of the court to the specific error of which complaint is made will not be considered. *Craw-*

ford v. State, 4 Ga. App. 789 (8), (62 S. E. 501). An assignment of error as to an instruction not erroneous in the abstract must point out its specific defect. A mere general assignment that a portion of it is error presents nothing for the consideration of a reviewing court, except as to its abstract correctness; and especially is this true when the charge as a whole is not embodied in the record.

2. As to whether the judge erred in overruling the motion for new trial so far as based upon the general grounds: The testimony might have authorized a finding either way. The trial judge, who heard the testimony and saw the witnesses, approved the finding of the jury. It can not be said that there is no evidence that there was a rescission of the contract between Rothchilds & Company and Jackson; for every circumstance confirms the statement that there was such a rescission, and Jackson himself, in his interrogatories, testifies that the contract was rescinded. The contract between Rothchilds & Company and Jackson itself provided for the retaking of the piano by Rothchilds & Company, and Jackson consented that they should exercise this privilege without legal proceedings. It is true that in order to have more effectually protected their rights, the sellers should have recorded the conditional bill of sale under which Jackson held the piano, but this failure on their part was at their own risk. In not giving creditors of Jackson notice by record they took the risk of other creditors not having notice brought home to them that the title was reserved. The question as to whether the plaintiffs in error in this case had actual notice of the state of the title to the piano, or as to whether the circumstances were sufficient to put them, as prudent men, on such inquiry as would have led to knowledge, was one to be determined by the jury, from the facts and circumstances which appear in the record. Our conclusion upon those facts might not have been the same as that reached by the jury in their finding. This, however, does not matter; for we can not say that the circumstances in proof were not sufficient to authorize the result reached by the jury.

Judgment affirmed.

3213. CARLSBAD MANUFACTURING CO. *v.* FLETCHER.

RUSSELL, J. There being conflict as to the very vitals of the case, the plaintiff having proved his case as laid, and the evidence in behalf of the defendant being squarely in conflict therewith, it was error to direct a verdict.

Judgment reversed.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Ocilla—Judge Oxford. January 4, 1911.

R. M. Bryson, Philip Newbern, for plaintiff.

H. J. Quincey, Walter M. Rogers, for defendant.

3223. NATIONAL DUCK MILLS *et al.* *v.* CATLIN & CO.

1. Where both a general and a special demurrer are filed to an answer and the trial judge dismisses it on general demurrer, the reviewing court, if it finds that the answer sets up any valid defense, though imperfectly pleaded, will reverse the judgment with direction that the trial judge shall hear the special demurrer and cause the answer to be made more certain.
2. Though the parties may have made what appears to be an entire contract, resting on mutual obligations, still if the contract is of such a nature as to give rise to separate and distinct demands or to create a number of separate obligations and cross-obligations, and a number of distinct breaches as to these separate obligations occur, the parties may make an accord and satisfaction, or what in law amounts to an accord and satisfaction, as to one or more of these demands, without affecting the others.
3. Where the defendant in a suit upon a promissory note pleads that the note was given for advances which the plaintiff was to make to him under the terms of a contract, and that, by reason of the plaintiff's refusal to continue to make advances in accordance with the terms of the contract, the defendant has suffered damage, the amount of which he seeks to set-off or recoup against the plaintiff's demand, the plea is properly stricken on general demurrer, where it also appears from it that all the items of damage which the defendant claims on this account were in existence and were known to him at the time he executed the note (in renewal of a previous existing note representing the same debt) and obtained an extension of time.
4. A plea setting up as a cross-action that the plaintiff, being purchasing agent for the defendant, bought for him under contract a quantity of goods containing concealed imperfections, which caused the defendant loss and damage, is properly stricken on general demurrer, where no act of infidelity or negligence on the plaintiff's part (that is, no breach of the contract of agency) is alleged.

5. The pleas in the present case, so far as they set up neglect and breach of duty on the plaintiffs' part as sales agents of the defendants, were, in a number of respects, subject to special demurrer, on account of indefiniteness of allegation, but were not subject to be stricken on general demurrer.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Atlanta—Judge Reid. October 21, 1910.

HILL, C. J., being disqualified, Judge Park, of the Albany circuit, was designated to preside.

Catlin & Company sued the National Duck Mills, a corporation, as maker, and certain others as indorsers, upon a promissory note for \$12,000, dated October 14, 1909, and due six months after date. The defendants admitted the execution of the note, but set up, for defense, that on August 12, 1907, the defendant corporation entered into a contract with the plaintiffs, by which it employed them as exclusive sales agents for the product of its mills, as well as purchasing agents to buy yarns for use therein; that by the terms of the contract of agency, the plaintiffs were to sell the entire output of the mills and to give, in this particular, faithful and competent service, for a commission of 5 per cent., to include all their expenses, and were also, from time to time, to make advances of money to the defendant, charging interest therefor at the rate of 6 per cent. per annum; that this contract was extended and renewed in January, 1908, so as to expire on January 1, 1909, and was again renewed for the year 1909, and that on June 2, 1909, it was broken and repudiated by the plaintiffs; that on faith of the contract the defendant began operation of its mills and was engaged in manufacturing duck, etc., had purchased the necessary yarns, and was carrying on its business generally, expecting the plaintiffs to carry out their contract; that in the course of the relations between these parties, the defendant became indebted to the plaintiffs in the sum of \$15,000 for advances, for which it executed a promissory note, and that the note for \$12,000, sued on, was given on October 14, 1910, in renewal of the balance due for advances; that by reason of the fact that on June 2, 1909, the plaintiffs renounced the contract and refused to advance any further money, the defendant had been damaged in the sum of \$35,000. The plea set forth with more or less detail a number of different ways in which damage ensued by reason of the plaintiffs' failure to

furnish the necessary money to carry on the business; all of which damage had ensued before the date when the note sued on was given. It was also pleaded that the plaintiffs, as agents for the defendant, purchased for its mills a quantity of yarn containing certain imperfections known as "slip knots," which caused the product manufactured from it to be rejected by the purchasers, to the defendant's loss in the sum of \$1,800; also that the plaintiffs, as sales agents for the mills, negligently instructed the mills to make up goods for orders which in one case were not promptly forwarded, and in the other case not forwarded at all, so that in both cases, by a drop in the market, which came before the goods so ordered made up could be disposed of, the mills lost certain amounts of money, which are set forth. Certain other transactions which need not be enumerated are set forth, and damages are alleged.

For the purpose of a better understanding of the following opinion, it may be stated that the defenses are of three classes: (1) pleas setting up damages because of the plaintiffs' failure to make advances; (2) a plea setting up damages because of imperfections in a lot of yarn purchased for the mills by the plaintiffs as purchasing agents; (3) pleas setting up damages because of negligence on the plaintiffs' part in their conduct as sales agents of the mills. The major portion of the damages is asserted under the pleas setting up damages for failure to continue the advances. The plaintiffs filed both general and special demurrers to these pleas. The court did not pass upon the special demurrer, but passed an order sustaining the general demurrer to the entire defense, probably for the reason insisted upon by counsel for the plaintiffs in error in this court, that the giving of the note sued on, after all these classes of defenses set up in the answer had arisen, prevented their being pleaded in set-off or recoupment, or otherwise, against the note.

Anderson, Felder, Rountree & Wilson, for plaintiffs in error.

Shepard Bryan, W. R. Tichenor, contra.

PARK, J. 1. The trial judge must be sustained, if at all, upon the theory that the defenses set up were not good as against a general demurrer. He did not pass on any special demurrer, and the reviewing court is not even informed as to the nature of the special demurrers interposed. It has no jurisdiction to attempt to review a judgment not rendered by the trial court; so, if the general demur-

rer was improperly sustained, the case should be remanded to the trial court, with direction that the trial court do hereafter pass upon the special demurrers, whatever they may be. Any other course would be eminently unfair to the defendants; for upon announcement by the trial judge that one or more of the special demurrers would be sustained, the defendants would have opportunity, as a matter of right, to amend. A reviewing court can not properly undertake to cut off this statutory right of amendment, by erroneously undertaking to uphold a judgment sustaining a general demurrer, upon the theory that the defendants' pleas might properly have been stricken upon timely and meritorious special demurrer. The defendants' pleadings were unquestionably open to special demurrer, on various grounds, but the reviewing court can not arbitrarily assume that the proper objections were raised by the special demurrers actually filed.

2. As this court is about to hold that certain of the pleas were properly stricken on general demurrer and that certain of them were not, it is well enough for us to point out in the beginning why the defendants would be estopped by their conduct in giving the note from setting up some of these defenses, and are not stopped from setting up others. The plaintiffs say that the contract sued on was entire and not severable, and that whenever accord and satisfaction, or what in law amounts to accord and satisfaction, took place as to the matter covered by the notes, which represented a part of the contract, the whole matter was settled and ended. In the first place it should be noticed that the plaintiffs do not sue upon the contract, but merely sue upon the note which the demurrer to the plea admits to have represented the defendants' liability under only one phase of the contract,—that is, the defendants' liability to the plaintiffs for advances. By a close examination of the case of *Armour v. Ross*, 110 Ga. 403 (35 S. E. 787), it will be seen that the Supreme Court has recognized and held that there may be separable demands under a single entire contract, and that where, under such a contract, there is more than one distinct demand, an accord and satisfaction as to one of them will not conclude the rights of the parties as to the other demands. In that case, as in this, there was a single contract, but a number of obligations; the parties made an accord and satisfaction as to one of them, and, though receipt in full was given, it was held that this did not settle the cause of action arising from a

breach of another obligation, although the breach had been consummated at the time the first settlement took place. The contract now before us involved, from the defendants' standpoint, three demands against the plaintiffs: (1) as to the plaintiffs' duty to advance money; (2) as to the plaintiffs' duty as sales agents; (3) as to the plaintiffs' duty as purchasing agents. The note sued on referred to that phase of the contract which relates to the advancing of money, and not to the other two. Under the *Armour* case, *supra*, the rights of the parties under these separate obligations may be treated as if each obligation constituted a distinct contract.

3. The contract set up in the answer is, certainly as to the obligation to make advances, an entire and not a severable contract, embracing mutual covenants. *Broxton v. Nelson*, 103 Ga. 330 (30 S. E. 38, 68 Am. St. R. 97); *Spalding v. Chamberlain*, 130 Ga. 654 (61 S. E. 533). And all the items of damages claimed by the defendants in paragraphs 10 and 11 of the answer grew out of breaches committed from time to time by the plaintiffs of their covenants under this very contract. It follows that these items of damages are not separable from the liability for money advanced to the defendants under the terms of the contract—both claims having arisen out of the transaction had under the same feature of the contract. The defendants' defense as to these items is one of recoupment, and not set-off. So, had they been sued on the notes falling due in October, 1909, they would have been compelled to urge their claims for these damages in defense to the suit, or have been forever barred from insisting thereon. Unlike a plea of set-off (which it is the privilege, but not the bounden duty, of a defendant to interpose to a suit based on an independent transaction), the defense of recoupment will not survive a recovery upon a cross-obligation urged by a plaintiff under the same transaction. Analogous to this estoppel by judgment (imposed upon a defendant who fails to file a timely plea of recoupment) is the rule of estoppel by silence, applied in cases cited by the defendants in error, where one party to a contract, when the day has come on which the other party can call him to a settlement, fails to set up any counterclaim under the contract, and (in order to get an extension of time of payment) makes an unqualified and unconditional promise to pay such other party the full amount of his claim. In each instance (in court or out of court) one party calls on the other for a set-

tlement, and the latter should in good faith urge then, if at all, any counter-claim which he may have, arising out of the subject-matter of settlement. Certainly he should not be allowed to mislead the other by making an unconditional promise in recognition of a liquidated liability which he then secretly intends to repudiate at a later date when he is called on to perform that promise.

There is a rule of law to the effect that one party to a contract does not, by recognizing and performing all of his obligations under the contract, waive, renounce, or injuriously affect his right to exact like compliance on the part of the other party and recover damages for a breach committed by such other party, prior or subsequent in point of time; so it would seem that the defendants might have paid off in full the notes due in October, 1909, without jeopardizing their right to bring suit against the plaintiffs subsequently and recover the damages for breaches of the contract set forth in their present pleadings. But the defendants did not pay under and in compliance with their obligations of the contract alleged. On the contrary, instead of complying with their obligation under that contract to repay the money advanced when it became due, these defendants induced the plaintiffs to agree to a renewal of that contract, and to give them six months additional time within which to pay the renewal note, without fail, when it should fall due. It is unthinkable that the plaintiffs would have consented to this novation had the defendants in good faith put the plaintiffs on notice that they denied owing the plaintiffs one cent, that they had a counter-claim of far more than the plaintiffs' claim of \$12,000 for money advanced under the same contract, and that when the renewal note fell due, they would refuse its payment, force the plaintiffs to sue on the note, and then set up this defense.

At the time this renewal note was given, the defendants had full knowledge of these defenses now urged for the first time. So they are not in a position to set up any equitable prayer for relief, based on fraud, accident, or mistake, or upon excusable ignorance, at the time they gave their renewal note, or to set up any counter-claim they had against the plaintiffs as to this feature of the contract. The plaintiffs repudiated the contract on June, 2, 1909; which gave the defendants the right to treat the contract as at an end, and immediately to set up all their claims for damages up to that time sustained. *Smith v. Ga. Loan Co.*, 113 Ga. 975

(39 S. E. 410). The defendants could have elected to treat the contract as still subsisting, provided they held themselves in readiness to fully perform all of their covenants under the contract, including the payment of their outstanding notes for money advances made by the plaintiffs as these notes fell due. *Smith v. Ga. Loan Co.*, supra. But (perhaps from necessity, as indicated by the pleas) the defendants did not elect to treat the contract as still of force, but closed down the manufacturing business and sold out the stock on hand to whomsoever would buy. The defendants did more than this: they induced the plaintiffs to grant indulgence, upon the faith of their promise to pay the renewal note at maturity. Six months gives exceptional opportunity, by way of disposal of assets, etc., in which to better prepare to spring a defense concealed under cover of silence until the other party to the contract has changed his position so that he can not sooner bring suit.

The defendants do not by their pleadings bring themselves within the decision in *McLendon v. Wilson*, 52 Ga. 41, to the effect that when, on the day of reckoning, one party gives to the other his note, with the distinct understanding and agreement that it is accepted, not in final settlement of mutual accounts, but subject to counter-claims against the payee, which the maker expressly reserves the right to set up in the future, no waiver on the part of the maker can be implied, and no estoppel by conduct can be urged against him when he is sued on the note. This exception to the general rule certainly affords full opportunity to overcome by proper pleadings and competent proof the presumption of the law of waiver of counter-claims silently withheld and undisclosed on the day of settlement. We may further add that the general rule of estoppel by silent acquiescence, invoked by the defendants in error, has been of long standing, and has received repeated recognition from the highest courts of this State. Ignorance of this rule of law may occasionally lead one into error. But ignorance of law is, in and of itself alone, no sufficient excuse. Besides, one, to be injured, would ordinarily have to be likewise ignorant of the common dictates of honesty and fair dealing between men, which would of necessity deter the upright man from misleading the other party by an apparent acknowledgment of the righteousness of his claim, by promising to pay it at a future date, without any intimation of subsequent intention to repudiate his promise by setting up a counter-

claim amounting to a practical denial of any indebtedness whatsoever. On the other hand, a relaxation of this general rule, based on good morals, would open wide the doors to fraud, concealment, and duplicitous conduct, calculated to deceive and mislead the other party, to his delay and injury in the prosecution of his legal rights, whatever they might be. So that the court did not err in sustaining the general demurrer to those portions of the defense which set up damages arising out of the breach of the obligation to make advances.

4. Paragraphs 12 and 16 of the answer are the ones that set up that the plaintiffs, as purchasing agents, bought for the duck mills a lot of yarn containing "slip knots." It is not alleged that the plaintiffs were in any wise negligent in their conduct as agents in this respect. Primarily the defendants' cause of action for the imperfections in the yarns furnished would be against the person from whom the plaintiffs purchased the yarn. The plaintiffs were not the opposite parties to this contract of sale, nor to the express or implied warranties contained in the contract of sale. The only ground of liability against them would be that they were guilty of some breach of duty as purchasing agents; and no such neglect of duty is alleged. Therefore the court did not err in sustaining a general demurrer to these paragraphs of the answer.

5. Paragraphs 13, 14, and 15 set up a breach of the plaintiffs' duty as sales agents, and allege an improper performance of services on their part, with consequent damage. It is true that in a number of respects these paragraphs of the plea might be subject to special demurrer, but, as against a general demurrer, they set up a cause of action, or, as pleaded in the present case, a cause of defense. As the damages set up in these paragraphs do not relate to that obligation of the contract to which the plaintiffs' demand relates (that is, the demand for repayment of money supplied by them under their obligation to make advances), they were not included in the settlement represented by the giving of the note, and, under the doctrine in the *Armour* case, *supra*, the defendants' right to insist upon them was not foreclosed by the giving of the note. Hence, the court erred in striking these defenses on general demurrer.

The judgment is affirmed so far as it relates to the defenses set up in paragraphs 10, 11, 12, and 16 of the answer. The judgment is reversed so far as it relates to the defenses set up in paragraphs

13, 14, and 15 of the answer, but with the direction that the court shall still proceed to hear such special demurrers as may be filed to these paragraphs, or to the general portions of the answer upon which these paragraphs are dependent.

Judgment affirmed in part, and reversed in part, with direction.

3260. KAUFMAN *v.* SEABOARD AIR-LINE RAILWAY *et al.*

1. The owner of certain goods delivered them, through his agents, to a common carrier, for transportation, and the agents took a bill of lading therefor in their own names. When the goods arrived at destination the agents refused to deliver the bill of lading to him, but he demanded that the carrier deliver the goods to him. The carrier refused to deliver to him unless he would produce the bill of lading. *Held*, that the carrier's refusal to deliver, under the circumstances stated, did not constitute a conversion; and that the owner of the goods could not maintain bail-trover for them against the carrier.
2. If the plaintiff in bail-trover replevies the property in controversy, on the defendant's failure to do so, and at the trial of the case suffers nonsuit, the defendant may enter up judgment against the plaintiff and the sureties on his bond for the value of the property; and if the defendant is content with the value stated in the plaintiff's affidavit to obtain bail, no further proof or assessment of value is necessary.
3. The principle stated in the immediately preceding headnote is applicable notwithstanding the defendant may not claim any title to the property, and only holds possession for some special purpose or under some limited right or title. The money recovered by the defendant through judgment is held for the benefit of all persons having lawful claim to or upon the property, accordingly as their respective interests may appear.

DECIDED JANUARY 15, 1912.

Trover; from city court of Atlanta—Judge Reid. February 2, 1911.

Kaufman engaged Jones & Company to crate and pack his furniture and to ship it to him from Norfolk, Virginia, to Atlanta, Georgia. Jones & Company shipped the goods by the Seaboard Air-Line Railway, taking the bill of lading in their own names. They attached this bill of lading to a draft for the amount which they claimed Kaufman owed them for their services in packing and crating the goods, and for freight charges paid by them on the shipment. When the goods arrived in Atlanta, Kaufman demanded them of the railway company, but delivery was refused

on the ground that he did not produce the bill of lading. He claimed that the goods had not been properly packed, and that, by reason of the negligence of Jones & Company in this respect, the shipment had suffered damage in excess of the amount of their charges. He therefore declined to pay the draft drawn on him by Jones & Company, and, hence, did not get possession of the bill of lading so that he could produce it in response to the railway company's demands. Thereupon he brought bail-trover against the railway company and its local agent; and, upon the company's refusal to replevy, the plaintiff gave bond in terms of the statute and took the goods. At the trial, the facts appearing substantially as has been stated, the court awarded nonsuit, and allowed the defendant to take judgment against the plaintiff on his bond for \$800, the amount stated in the plaintiff's petition and affidavit for bail as the value of the goods. To this the plaintiff excepted. There are certain other assignments of error, as to rulings on evidence, but the opinion of this court on the main question is of such a nature as to render unnecessary any decision on these minor questions.

Joseph W. & John D. Humphries, William F. Phillips, for plaintiff.

King & Spalding and Underwood, for defendants.

POWELL, J. (After stating the foregoing facts.)

1. "The gist of the action of trover is the conversion of the plaintiff's property by the defendant, that is to say, that the defendant wrongfully deprived the plaintiff of possession." *Bell v. Ober*, 111 Ga. 668, 672 (36 S. E. 904). That in the present case the railway company acquired possession of the goods lawfully is conceded; the goods were delivered to it in regular course by the plaintiff's own agents. However, a conversion may consist in retaining possession lawfully acquired after the right to retain it has ended; and this is what the plaintiff contends happened in this case. So the plaintiff's right to recover depends upon whether the defendant company, as a common carrier, was justified in retaining the goods and in enforcing its demand for a production of the bill of lading as a condition precedent to delivery, against his demand that the goods be delivered to him on his claim that he was the true owner, notwithstanding the bill of lading was outstanding in the name of another. This point is settled adversely to the plaintiff in the case of *Sellers v. Savannah, Florida & Western Ry. Co.*, 123 Ga.

386, where it is held that "Inasmuch as the law imposes liability upon a common carrier when a delivery of freight is made by mistake to a person not entitled to receive the same, it is the right of the carrier to call upon an unknown person claiming a shipment to identify himself and establish his claim thereto; and where a bill of lading covering the shipment has been issued, the carrier may demand its production as a condition precedent to making delivery."

2. In bail-trover where the defendant fails or refuses to replevy and keep the possession of the goods, the plaintiff has the option of doing so. Civil Code (1910), § 5152. However, if the plaintiff thus causes the possession of the property to be transferred from the defendant to him, he stands chargeable as for a conversion of it, unless he recovers in the suit. If the case proceeds to verdict and the defendant prevails, he is entitled to take his choice of one of three forms of verdict, namely: (1) for the specific property, or (2) for the market value of the property at the date of the conversion, with the addition of hire or interest, or (3) for the highest proved value of the property between the date of the conversion and the date of the trial, without hire or interest; and if he chooses a money verdict, he may take judgment against the plaintiff and the sureties on the replevy bond for the amount assessed by the jury in his favor. *Bank of Blakely v. Cobb*, 5 Ga. App. 289. The defendant has a similar option if the plaintiff's action is dismissed (*Marshall v. Livingston*, 77 Ga. 21), or if it terminates in nonsuit. *Lauchheimer v. Jacobs*, 126 Ga. 261. The defendant in any of these events may ask for the question of value to be submitted to the jury for assessment; but, if he is content with the value sworn to by the plaintiff in his affidavit for bail, verdict is unnecessary, and he may, upon the sworn admission of the plaintiff as contained in this affidavit, take judgment against the plaintiff and his sureties for the sum stated in the affidavit, with interest thereon. See, in addition to the cases cited above, *Mallory v. Moon*, 130 Ga. 591; *Block v. Tinsley*, 95 Ga. 436; *Thomas v. Price*, 88 Ga. 533; *Hayes v. Jordan*, 85 Ga. 741; *Jaques v. Stewart*, 81 Ga. 82.

3. It is contended, however, that, though the general rule may be as has been stated, it does not apply where the defendant whose possession has been violated does not claim to own the property absolutely, but holds the possession under some special right or title; that in this case the judgment of the court below would result in

grave injustice if allowed to stand, because the defendant claimed no title to the goods, but claimed only the right to hold them, in its capacity as a common carrier, until the question as to who had the right to receive them could be determined; that as the goods were the plaintiff's, he ought not to be required to pay the defendant for them. The rule does apply, and no injustice is done. The plaintiff took the goods from the defendant's possession without having the right to do so. When his lack of right was judicially established, it was obligatory on him, under his replevy bond, to put the property or its value in money back into the defendant's hands. When, under the restitution, the defendant company takes money instead of the property, it will hold the money on terms like those on which it held the property. The defendant will hold the money not for its own ultimate benefit, but for its protection. The plaintiff, by presenting the bill of lading and by identifying himself as the owner of the goods, will be entitled to receive the money from the defendant on the same terms as he would have been entitled to receive the goods. If he can not get possession of the bill of lading, because of illegal claims asserted by Jones & Company, he may take such steps in law or in equity as shall be necessary to extinguish these claims, to identify himself as the sole owner of the goods and to give adequate protection to the defendant. These things could not be accomplished in the present action, for lack of necessary parties, if for no other reason. The only real ultimate hardship, if any, on the plaintiff is that he will have to pay the costs; and this hardship he imposed on himself by mistaking his remedy.

Judgment affirmed.

3269. WILLIAMS-THOMPSON CO. v. WILLIAMS *et al.*

1. For the payee of a promissory note to release one of the makers, there must be a contract to that effect, founded on a consideration, except, of course, in certain cases where release flows, by operation of law, from conduct of the payee.
2. Where the payee of a joint promissory note executes and delivers to one of the makers a writing purporting to release him from all liability thereon, the writing is ineffectual for that purpose if it is voluntarily given, without legal benefit to the maker of the release, or detriment to the person in whose favor it is made.
3. "The release of or compounding with one surety discharges a cosurety;"

- but an attempt to release one of the sureties does not have this effect where the attempted release is unenforceable for lack of consideration.
4. To "compound" is to compromise or make a composition whereby a creditor discharges his debtor on payment of a smaller sum than that actually owing. There was no compounding with the surety in the present case.
 5. Even if the rule were that the payee of a joint note would discharge all the joint makers thereof by giving to one of them the money to pay off his ratable part of the debt, no such effect ensues where the money is given by a third person.

DECIDED JANUARY 15, 1912.

Complaint; from city court of La Grange—Judge Harwell. January 9, 1911.

Anderson, Felder, Rountree & Wilson, E. R. Bradfield Jr., for plaintiff. *F. M. Longley, M. U. Mooty,* for defendants.

POWELL, J. W. L. Williams was indebted to the Williams-Thompson Company, a corporation. On January 25, 1909, in settlement of this debt, he gave to the corporation a negotiable promissory note, signed by himself as principal and by six others (the present defendants, Williams himself not being found or served), who signed apparently as joint makers, but in fact as sureties. On the next day after the note was signed and after the original transaction was closed, one of the sureties, named Harris, came to the officer of the corporation who had taken the note and stated that he wished to "come off" the note. This officer of the corporation, being, for some reason, willing to accommodate Harris, gave him a written instrument "releasing W. H. Harris from all responsibility by reason of his indorsement" of the note in question. Harris gave nothing for this release, and the corporation received nothing for executing it. Later the officer told Harris that he had no power to bind the corporation by his act, but that he would nevertheless protect him, and gave him \$100 of his (the officer's) own money with which he might discharge his share of the liability; but Harris returned this money to him. The six sureties, being sued on the note, pleaded that Harris had been released, and that, as the others were joint sureties with him, they were also released. Some point is made as to the authority of the particular officer to bind the corporation, but we need not go into that question, as there is another point that controls the case. The plaintiff's exceptions are to the direction of the verdict for the defendants.

1. The release of a party to an executed contract is itself a

contract, and, to be binding, must be founded on a consideration. *Bruton v. Wooten*, 15 Ga. 570; *Stamper v. Hayes*, 25 Ga. 546; *Molyneaux v. Collier*, 30 Ga. 731; *Fowler v. Coker*, 107 Ga. 817 (33 S. E. 661).

2. This release was without consideration. The consideration of a contract usually must consist of some benefit to the person to be bound, or of some detriment to the other party. Under this contract of release, all the benefit accrued to the taker of the instrument, and none to the maker; all the detriment accrued to the maker, and none to the taker. Hence, it was without consideration. *Clark*, Contracts, 106. At common law a release under seal conclusively imported a consideration, but this is not now true, as respects the American States generally (*Williston-Wald's Pollock on Contracts*, 813), or as respects Georgia in particular. *Lacey v. Hutchinson*, 5 Ga. App. 865 (64 S. E. 105); *Bruton v. Wooten*, supra. The record does not show whether the release relied on in this case was under seal or not, but, in the light of the authorities just cited, this makes no material difference, as lack of consideration was affirmatively shown by the proof.

3. "The release of or compounding with one surety discharges a cosurety." Civil Code (1910), § 3542. If the so-called release had been valid, Harris would have been released, and so would his cosureties; but, since the release is invalid for lack of consideration, neither he nor his cosureties are released. *Fowler v. Coker*, supra.

4. There is nothing in the evidence on which to base the suggestion of counsel for the defendants in error that there was a release of the other sureties through the plaintiff's compounding with Harris. To "compound," according to *Black's Law Dictionary*, is "to compromise, to effect a composition, to obtain discharge from a debt by the payment of a smaller sum." Harris paid nothing; hence, the transaction was not a compounding.

5. The \$100 which the plaintiff's officer afterwards paid to Harris out of his (the officer's) own money certainly did not affect the case. Even if the giving of this money had been the company's own act, it is doubtful that it would have operated as a release of the other sureties; for when Harris had paid in this sum, though he would thereby have paid his ratable part if all the sureties proved solvent, he would not have discharged his liability as a joint maker of the note. No legal harm would have been done his cosureties.

But certainly the individual act of one of the officers of the corporation in giving his money to Harris did not affect the liability of any of the parties.

The hardship of the case is that the principal on this joint note proved unworthy of the confidence reposed in him by his friends who stood his security. The law is very technical in favor of sureties, and justly so. However, we find no legal reason on which the judgment of our able brother of the trial bench can be sustained, though we have examined the questions with great care; for our knowledge of his fairness and ability as a judge makes us canvass our conclusions carefully, lest we be wrong, when we find ourselves disagreeing with him.

Judgment reversed.

3278. McCORD v. HILL.

- HILL, C. J. 1. The petition in a bail-trover suit described specifically each article of property sought to be recovered, but failed to give the value of each article, giving the aggregate value of all the articles described. *Held*, that the value of the articles was sufficiently stated, and a demurrer to the petition because the value of each separate article was not given was properly overruled.
2. The property sought to be recovered in a bail-trover suit was transferred to the plaintiff by the defendant as security for the payment of a promissory note, under § 3306 of the Civil Code (1910). On the trial the defendant offered to prove that before the note matured, and before any demand was made on him for the delivery of the property sued for (several head of cattle), the cattle had died, and that this fact was known by the plaintiff when he brought the suit; and the trial judge refused to allow the proof. *Held*, error. To maintain trover, the plaintiff must show title, or the right of possession, in himself, and possession or conversion by the defendant. The testimony offered was competent evidence to disprove both possession and conversion by the defendant. Civil Code (1910), § 4483.
3. The above is true although the defendant had agreed, in the written contract, to take all risks of injury to or death of the property transferred, and agreed that if the note was not paid at maturity, the plaintiff could sue for recovery of the property, "by bail-trover or otherwise." The essentials of a trover suit are given by the statute, and can not be enlarged by agreement.
4. The plaintiff's remedy was suit on the note. *Judgment reversed.*

DECIDED JANUARY 15, 1912.

Trover; from city court of Washington—Judge Wynne. February 13, 1911.

F. H. Colley, for plaintiff in error, cited: 4 *Ga. App.* 733 (4), 739; 111 *Ga.* 668-72; 117 *Ga.* 161; 118 *Ga.* 543.

W. A. Slaton, F. W. Gilbert, contra, cited: 7 *Ga. App.* 354, 519; 67 *Ga.* 672.

3280. VOLUNTEER STATE LIFE INSURANCE CO. *v.*
BUCHANNAN.

1. In this State the rule is well settled that a person has a right to procure an insurance policy on his own life, and to assign it to one who has no insurable interest in his life, provided it be not done by way of cover for a wager policy; and the intention of the insured in taking out the policy and in making the assignment, and of the assignee in accepting the assignment, are questions of fact, for determination by a jury.
2. There is some evidence in the present case tending to show that the policy contract was valid, and that the assignment thereof was made in good faith, for a valuable consideration.
3. *Query*: Where the evidence shows that an assignment or sale by the insured, of a policy of insurance, to one who had no insurable interest in his life was made with the knowledge of the insurance company, and the company subsequently received the premiums directly from the assignee for three years, and the policy provided that after two years it would be incontestable on any ground, would not the company be estopped from contesting the validity of the policy? And even if not estopped, could the company make any contest of the validity without first tendering back the premiums which it had received from the assignee of the policy?
4. Where the assignee of a policy of insurance, which provides that the assignment is "subject to proof of interest of the assignee," makes timely proof of loss, in which he states that he holds the policy as an absolute purchaser for value, and not as collateral security, and subsequently, in reply to letters from the insurance company, asking for proof of interest, writes to the company that his interest is that of an absolute purchaser for value, and repeats the same statement to a special agent of the company, sent to him by the company for the purpose of finding out the interest of the assignee and making a settlement with him of the policy, this is a substantial compliance with the provision of the assignment requiring proof of interest by the assignee.
5. There was no error in excluding the testimony of the agent of the insurance company through whom the application for the policy was made, to the effect that he disapproved the policy because in his opinion it was a wager policy; and in also rejecting the testimony that in the town where the insured lived, there was a great deal of speculation in policies of insurance.
6. The exceptions made to portions of the charge of the court are without

merit; and the written requests to charge were substantially covered by the general instructions.

7. No error of law appears, and the verdict is supported by some evidence.

DECIDED JANUARY 15, 1912.

Action on insurance policy; from city court of Americus—Judge Crisp. February 7, 1911.

Smith & Carswell, R. L. Maynard, for plaintiff in error, cited: 87 Ga. 681; 130 Ga. 209; 6 Enc. Ev. 23; 117 U. S. 591 (20 L. ed. 1000); Cooley's Briefs on Ins. 258, 261, 273-4; Civil Code (1910), § 2479; 125 Ga. 216-217; 104 Ga. 269-70; 25 Cyc. 736; 138 Mass. 24; 122 Ky. 402, 12 A. & E. Annot. Cases, 685, 121 Am. St. R. 467; 70 Am. St. R. 424; 121 N. Y. 399; 9 Fed. 249; 57 Am. D. 103; 94 U. S. 457, 460; 3 Ga. App. 686; 102 Am. St. R. 552; 70 Am. St. R. 429, 650; 122 Ga. 49. .

E. A. Hawkins, contra, cited: Civil Code, § 2498; 125 Ga. 206 (6 L. R. A. (N. S.) 128, and notes); 109 Ga. 1, 3, 5; 112 Ga. 545; 131 Ga. 568, 570; 132 Ga. 495; 3 L. R. A. (N. S.) 934, and notes; 25 Cyc. 709, 764, 868; 4 Ga. App. 342; 6 Ga. App. 721; 104 Ga. 256, 271-2; 124 Ga. 513; 59 Ga. 813 (3); 62 Ga. 251; 57 Ga. 469; 101 Ga. 594 (1), 596; 116 Ga. 502, 805; 130 Ga. 835.

HILL, C. J. This was a suit on an insurance policy, to recover its face value (\$5,000), besides interest, attorney's fees, and damages, as provided for in §§ 2549 and 4392 of the Civil Code of 1910. The policy was on the life of Davis P. Holt, and by its terms was payable to his estate or assigns. It was dated April 26, 1906, and was duly transferred and assigned to the plaintiff, for a valuable consideration, on May 8, 1906. The insured died in November, 1909, and proofs of death, as required by the contract, were made by the assignee of the policy and presented to the insurance company, and demand was made upon it by the assignee for payment of the amount of the policy. The evidence showed also that the insurance company had received directly from the assignee the premiums due on the policy from the time for which it was in force until the death of the insured, and that when the assignment was made, the company had due notice and consented to it. The foregoing facts are not controverted. The jury returned a verdict for the plaintiff, for the amount of the policy, refusing to find in favor of the claim for attorney's fees and damages. The defendant's motion for a new trial was overruled.

Two defenses were relied upon. First, it was contended by the

insurance company that the assignee had not complied with the terms of the assignment, it being provided therein that the assignment was "subject to proof of interest of the assignee." The assignment does not provide how this proof of interest shall be made. The evidence shows, as to this matter, that in the proof of loss the plaintiff claimed that he was entitled to the amount of the policy as "the absolute owner," by virtue of the assignment. A few days thereafter, in replying to letters from the insurance company, asking for information as to his interest, he wrote that he was the absolute owner of the policy, having bought it outright for a valuable consideration; and subsequently, when the special agent of the company was sent to him for the purpose of obtaining more definite information on this subject, and for the further purpose of adjusting the loss, the plaintiff repeated what he had already written to the company,—that he was in fact the absolute owner of the policy, for a valuable consideration; that he had bought it outright, and that he did not hold it as collateral security for any indebtedness which the insured owed him. We think this evidence shows that there was a compliance with this provision of the policy. We do not see how there could have been a more definite and specific compliance than was made both in the letters written to the company on the subject, and in the information directly given to the special agent.

The second and principal defense relied upon was the contention that the contract of insurance was invalid because it was a wagering contract; that the insured and the plaintiff had entered into an agreement that the insured should apply for the policy, and that, after obtaining it, he would transfer it to the plaintiff, in consideration of an advancement of \$300 or \$400 made to him by the plaintiff; that the insured was not able to pay the first premium, and, in compliance with this mutual agreement, made the application through the agent of the company; that when the policy was delivered to the insured, he went to the assignee for the money to pay the first premium, and the money was advanced to him by the plaintiff for the purpose of paying the premium, and that three or four days thereafter the assignment was made, in consideration of this advance and in performance of the previous agreement between the two in reference thereto; that the plaintiff knew that the insured, at the time he made the application for insurance, was

a habitual drunkard, and knew that he was in a delicate state of health, and would probably die prematurely from the excessive use of liquor, and on this account the plaintiff was willing to hazard the premiums on the policy of insurance, with the hope and belief that he (the plaintiff), as the assignee, would in a short time receive the full amount of the policy; in short, that the policy was taken out and the assignment made for the purpose of evading the law in reference to gambling contracts, and the means adopted were simply a cover for a wager policy. As to this defense it may be stated that there were some strong circumstances tending to show that it was the truth of the transaction, except as to the charge that the insured was a habitual drunkard. This fact was not proved, but it was shown by circumstances that he was unable to pay the first premium, and that he did make application to the plaintiff for the money out of which the first premium was paid; but the plaintiff swears positively that Holt came to him with the policy and offered to sell it to him for \$300, and, after some negotiations, he did buy it outright from Holt, and held it under a written assignment, which was subsequently approved by the company; and that he gave the \$300 to Holt and took the assignment in ignorance of the fact that the premium had not been paid. There is other testimony which bears more or less on this defense, but the question was one exclusively for consideration by the jury. The learned trial judge clearly and fully charged the law as laid down by the Supreme Court in the case of *Rylander v. Allen*, 125 Ga. 206 (53 S. E. 1032, 6 L. R. A. (N. S.) 128), that "one has the right to procure insurance on his own life and assign the policy to another, who has no insurable interest in the life insured, provided it be not done by way of cover for a wager policy." The law which controls this question of wager contracts of insurance is so fully and clearly set out in the learned and elaborate opinion of Mr. Chief Justice Fish, in the decision which is cited, that it will be unnecessary to add any other authority or to discuss the question any further. The law, therefore, having been correctly charged by the court, and the question of the intent with which the policy was taken out and assigned being a matter for the jury exclusively, this court can not interfere, unless there was in the trial of the case some material and prejudicial error against the defendant. We

have examined the special assignments of error very carefully and will dispose of them briefly.

In support of the contention that the contract in question was a wager contract, testimony was offered that the local agent of the company, through whom the application for the insurance was made, had expressed himself as being opposed to writing this kind of insurance (meaning speculative), and that in the years 1905 and 1906 there was a good deal of speculative insurance written in Americus, the home of the applicant in this case. We think the testimony was inadmissible and immaterial for the purpose of showing that the contract in question was a wager contract; and the citations relied upon in support of the admissibility of the evidence are not in point. The authorities cited are to the effect that other transactions than the one under investigation may in some cases be admitted for the purpose of illustrating intention. *Mutual Life Insurance Co. v. Armstrong*, 117 U. S. 591 (20 L. ed. 1000); *Small v. Williams*, 87 Ga. 681; 6 Enc. Ev. 23.

Several written requests to charge were duly made by the defendant. The instructions requested were pertinent to the defense, if the contract in question was a wager contract, and was therefore void. We have examined these requests in connection with the general instructions, and we find that they are fully, indeed most favorably to the insurance company, covered by the general instructions on that subject, and it would have been superfluous reiteration for the court to have given them in charge.

It is also contended that the court erred in charging the jury that, under the terms of the contract of insurance, "it would be incontestible after the expiration of two years, except that the insured participate in the military service—the army or navy." It is said that this instruction was not applicable to the facts of the case and was prejudicial to the defendant. This was the provision of the contract, and the court gave it in connection with the instruction that unless the jury found that the contract was a valid contract, it would not be applicable, because if it was a wager contract it was void ab initio. The instruction objected to, therefore, was beneficial to the defendant; for otherwise the jury might have inferred that after two years (and it was undisputed that the contract had been in force for more than two years), it was incontestible, even if they found it was a wager contract. Besides, one

of the defenses relied upon, as to which some evidence was introduced, but which, as before stated, was not satisfactorily proved, was that the insured, at the time he took out the policy, was a habitual drunkard, and it was contended that if this was true, he falsely represented the condition of his habits to the company, and for this reason the policy was void. The charge, therefore, as to its being incontestible after two years, was referable to this defense.

The foregoing is a brief discussion of the essential questions raised by the record. After a careful examination of the evidence and of the charge of the court, and also the law applicable, we have come to the conclusion that the court committed no error in the trial, and that while there were some strong circumstances tending to establish the defense that the contract was a wager contract, yet there was positive evidence to the contrary on the part of the plaintiff; and as this was a matter exclusively for decision by the jury, the judgment refusing a new trial must be *Affirmed.*

3286. THOMAS v. MONTICELLO VEHICLE CO.

HILL, C. J. 1. In a suit in a justice's court on an account, where the judgment was in favor of the plaintiff, for principal and interest, it was not erroneous for the justice to enter a judgment for the amount of interest, as well as for the principal, due on the account, at 7 per cent. per annum from the date when the account became due; nor to enter judgment against the defendant for the costs, including the jury fee (paid by the plaintiff on reception of the verdict), when the case was appealed to a jury in the justice's court.

2. No error of law appears, and there is some slight evidence to support the verdict in the justice's court; hence, the judgment of the superior court in overruling the certiorari must be *Affirmed.*

DECIDED JANUARY 15, 1912.

Certiorari; from Jasper superior court—Judge J. B. Park.
March 1, 1911.

A. Y. Clement, for plaintiff in error.

Doyle Campbell, contra.

3301. *PACE v. VIRGINIA-CAROLINA CHEMICAL CO.*

POWELL, J. The petition did not show a case of liability, and the court did not err in dismissing it on demurrer. *Judgment affirmed.*

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Albany—Judge Crosland.
February 23, 1911.

R. J. Bacon, Ben T. Burson, for plaintiff.

C. E. Battle, Howell Hollis, for defendant.

3304. *WESTON v. BEVERLY & McCOLLUM.*

1. Garnishment proceedings, being purely statutory, can not be extended to cases not enumerated in the statute, and courts have no right to enlarge the remedy or hold under it property not made subject to the process.
2. "Suit is the following of a person, and is not only not technically, but not even in common parlance, applied to seizures or proceedings in rem."
3. A suit or judgment on which valid garnishment proceedings are based must be a suit or judgment in personam, and not in rem.
4. The foreclosure of a laborer's lien, in which there is no levy, and no issue made by counter-affidavit, is in no sense a suit in personam, but is a summary proceeding in rem.

DECIDED JANUARY 15, 1912.

Certiorari; from Grady superior court—Judge Frank Park.
March 6, 1911.

J. Q. Smith, L. H. Foster, for plaintiff.

M. L. Ledford, contra.

HILL, C. J. Frank Weston foreclosed a laborer's lien against Lewis Weston, and seized under levy certain lumber as property of defendant. A claim to this lumber was filed by the Dyson Manufacturing Company; whereupon Weston dismissed his levy and sued out process of garnishment, and had summons served upon the Dyson Manufacturing Company. Subsequently Beverly & McCollum obtained a judgment against Lewis Weston in a suit on an account, which suit was pending when the foreclosure proceedings were instituted, and, on this judgment, obtained process of garnishment and caused summons to be served on the Dyson Manufacturing Company. The garnishee answered, admitting indebted-

ness, and paid the money into court for distribution, and the justice awarded it to Beverly & McCollum on their judgment, as against the laborer's lien foreclosure proceedings. Frank Weston's petition for certiorari was dismissed by the judge of the superior court, and he excepted.

Only one question is raised for decision. Can garnishment proceedings issue on the foreclosure of a laborer's lien? If so, the plaintiff was entitled to the money paid into court by the garnishee. If not, the judgment of the justice, awarding it to the common-law judgment, was correct.

Summons of garnishment, under the statutes of this State, can issue only in three classes of cases: (1) where there is a suit pending; (2) where a judgment has been rendered by a court having jurisdiction (Civil Code of 1910, §§ 5094, 5265); and (3) where a tax-collector has issued execution, has it in his hands, and, being unable to find any property of the defendant, makes an entry of nulla bona thereon. Civil Code (1910), § 1154. Process of garnishment issued in any other case or upon any other ground is without authority of law. *Davis v. Millen*, 11 Ga. 452 (36 S. E. 803).

Garnishment proceedings are purely statutory, and can not be extended to cases not enumerated in the statute, and courts can not enlarge the remedy; and, to entitle one to the benefit of the statute, he must show that his case is clearly provided for. This remedy can not be extended to doubtful cases. Rood, Garnishment, § 13; *Davis v. Millen*, supra. The second and third cases where garnishment proceedings are provided for by the statutes above quoted are not applicable here.

Is the foreclosure of a laborer's lien a pending suit upon which garnishment process is predicable? We think not. It is in a very loose sense that a proceeding in rem can be called a suit. "Suit is the following of a person, and is not only not technically, but not even in common parlance, applied to seizures or proceedings in rem." The Little Ann (U. S.), 15 Fed. Cases, 622. The foreclosure of a lien is strictly a proceeding in rem. It pursues the property, and not the person. It does not become in any sense a suit until a counter-affidavit is made. Civil Code (1910), § 3366, par. 6; *Sams v. Covington Buggy Co.*, ante, 191 (73 S. E. 18). To authorize a valid garnishment, the judgment or decree upon

which it issues must be final, and must be in personam, and not in rem. 20 Cyc. 980, and citations.

We conclude that the judgment of the justice in awarding the fund paid into court by the garnishee to the judgment in personam was right, and there was no error. *Judgment affirmed.*

3313. SALANT & SALANT v. DANNENBERG COMPANY.

A. bought from B. goods according to samples exhibited. When the goods were subsequently delivered, A., on inspection, notified B. that the goods were not according to contract, and were rejected, and were held subject to B.'s order, for reshipment or other disposition. B. declined to retake the goods, insisting that they were in accordance with the warranty. A. therefore placed the goods in his storehouse, and, B. continuing his refusal to retake them, and the goods being of a perishable character and liable to deteriorate in value by being kept on hand, A. sold them in the market. *Held:* (1) A.'s conduct did not amount to an acceptance of the goods, or a waiver of his right to recover damages for breach of the contract. (2) It was A.'s duty to use due care in preserving the rejected goods after B.'s refusal to retake them, and also to minimize the eventual damages.

DECIDED JANUARY 15, 1912.

Attachment; from city court of Macon—Judge Hodges. January 14, 1911.

The Dannenberg Company sued Salant & Salant, alleging, that the defendants sold to the plaintiff 100 dozen shirts at \$3 per dozen, to be shipped from New York to Macon, and to correspond with a sample dozen shirts left with the plaintiff when the contract was made; that subsequently the contract was mutually rescinded, except as to 78 dozen shirts; that when the 78 dozen shirts were received by the plaintiff it refused to accept them, because they were inferior and wholly unlike the samples; that immediately upon discerning this fact shirts like the samples were demanded of the defendants, and they refused to ship any others; that thereafter they were notified that the plaintiff refused to accept the shirts, because of their inferior quality and failure to come up to samples, and that they were held subject to their order and without insurance; that the market value of the shirts, according to the sample dozen, was \$4.50, instead of \$3 per dozen, and the suit was for the difference between the market price and the contract price. The answer admitted a sale of 100 dozen shirts and the

subsequent mutual rescission except as to the 78 dozen. It was denied that the sale was by sample, or that the 78 dozen delivered were inferior, or that there was any breach of warranty. The answer averred also that the defendants had sued the plaintiff, in New York, for the purchase-price of the 78 dozen shirts; that the suit was pending, and that the defense thereto was based upon the same allegations as made in the plaintiff's declaration here. The evidence was in conflict on the issues made by the pleadings, and therefore, the finding of the judge, who, by consent, acted without a jury, must be considered as conclusive on these issues. The evidence further showed that the shirts were shipped from New York on March 8, and received in Macon on March 20. On March 24 the plaintiff wrote to the defendants complaining of the condition and quality of the shirts; that they were not up to the samples, and that they were held subject to the defendants' order, without insurance. On March 29 the defendants wrote to the plaintiff: "We will have to ask you to keep the goods shipped to you, as they are certainly what was sold to you." On April 1 the plaintiff wrote to the defendants, again notifying them that the goods were held subject to their order, uninsured, and asking for shipping instructions. On April 4 the defendants wrote, positively declining to accept a return of the shirts, or to make any disposition of them. On May 14 the plaintiff began suit by attachment, and some time thereafter the defendants sued the plaintiff, in New York, for the purchase-price. Subsequently to this correspondence and the filing of suit, the shirts were being injured by being kept in stock, "getting dusty and rat eaten," and deteriorating in value, and, in order to prevent further loss in the shirts, the plaintiff sold as many of them as it could. The trial resulted in a finding in favor of the plaintiff, of \$117, and the defendants' motion for a new trial was overruled.

Lane & Park, for plaintiffs in error.

Hardeman, Jones, Callaway & Johnston, contra.

HILL, C. J. (After stating the foregoing facts.)

Assuming that the finding of the judge on the issues of fact is conclusive, one question of law is presented. Did the conduct of the Dannenberg Company in receiving the shirts, placing them in its store, and subsequently selling them to prevent further deterioration in value, for the purpose of lessening the loss, amount

to an acceptance of the shirts and a waiver of its right to sue Salant & Salant for a failure to deliver in accordance with the contract? It is well settled that where goods are sold by samples exhibited, an express warranty arises that the goods subsequently to be delivered will be of the same quality as the samples, and that on receipt of the goods the buyer is not bound to inspect before acceptance; but if, on receipt, he does inspect, and discovers defects before acceptance, it then becomes his duty to reject them. If, after knowledge of the defective quality, he retains the goods and deals with them as his own, such conduct will amount to an acceptance and will be a waiver of the defects so discovered. *Christian v. Knight*, 128 Ga. 501 (57 S. E. 763); *Carolina Portland Cement Co. v. Turpin*, 126 Ga. 677 (55 S. E. 925), and citations. Here the proof is that the purchaser, before acceptance, discovered the inferior quality of the shirts as compared to the samples, and immediately notified the sellers of the fact, and that the shirts were held subject to the sellers' order and directions as to disposition or shipment. While the Dannenberg Company placed the shirts in its store, it did not treat them as a part of its stock by selling any of them to customers; but when the sellers absolutely refused to take the shirts back, or to give any direction as to disposition, and when the shirts were deteriorating in value by dust, the depredation of rats, etc., the purchaser sold them for the purpose of lessening the eventual damages. This conduct did not amount to an acceptance of the shirts; for, when the purchaser at once notified the sellers of the inferior condition of the shirts, and offered to reship them, stating that they were held subject to the sellers' order, the purchaser did all it could do; and when, after the refusal to rescind, the shirts were deteriorating in value, it was the purchaser's duty to sell, in order to diminish the damages.

It is insisted by the plaintiffs in error that the purchaser, by selling the goods, made it impossible for the sellers to retake the goods, and, therefore, that the purchaser can not claim a rescission. The answer to this contention is obvious. The sellers had previously absolutely refused to retake the goods, and there was nothing left for the purchaser to do, except to hold the goods as the involuntary bailee of the seller. Civil Code (1910), § 3495. If there was a breach of duty on the part of the purchaser as such bailee, it should have been set up by plea; but the defendants' only

plea was that the shirts were as warranted. There was no plea that the plaintiff had accepted the shirts, nor was there any effort to set off or recoup the value of the rejected shirts. If the sellers had claimed that they were entitled to the amount for which the shirts had been sold, the claim would doubtless have been allowed. Under the pleadings and the evidence, we think the finding of the judge was correct.

Judgment affirmed.

3334. JAMES *v.* PEPPER, constable.

1. To render admissible secondary evidence of a lost mortgage purporting to have been made in another State, it must be shown that the lost original mortgage was executed in conformity with the law of that State. Proof that the signing of a paper in the State of Florida was attested by two witnesses, neither of whom signed officially, is insufficient to prove its legal execution as a mortgage, since the law of Florida requires a mortgage to be attested by an officer.
2. A levying officer may, at his own risk, deposit with a bailee, for safe keeping, personal property which he has subjected to levy; and in thus depositing it he does not relinquish possession, but merely selects an agent to retain possession in his behalf. The possession of this agent is still the possession of the levying officer; and a conversion of the property by the bailee, though it consist of nothing more than his failure to deliver on demand, entitles the officer to proceed by trover. Any agreement of a levying officer, affecting the disposition of property which has been subjected to a levy, is contrary to public policy, and void, if it tends to defeat, or in any wise affects, the legitimate result of the legal proceeding of which the levy forms a part.

DECIDED JANUARY 15, 1912.

Trover; from city court of Blakely—Judge Crosland presiding.
March 9, 1911.

J. R. Pottle, C. L. Glessner, for plaintiff in error.

W. A. Thompson, John R. L. Smith, H. M. Calhoun, contra.

RUSSELL, J. This is the second time that this case has been before this court. (See 7 Ga. App. 518, 67 S. E. 218.) None of the points presented at the former hearing are involved in the present writ of error, except the relevancy or admissibility of evidence relating to a mortgage under which the plaintiff claimed a lien. When the case was here before, we held that the evidence with relation to the mortgage was inadmissible, in the absence of proof of the proper execution of the mortgage. In the trial now under review the judge excluded the testimony with reference to the

mortgage; and exception is taken to that ruling. The motion to exclude this testimony was as follows: "We move to rule out the evidence in reference to the mortgage of the Bank of Blakely, and the mortgage itself, on the ground that it is illegal and irrelevant." Inasmuch as it was not shown that the mortgage, which appears to have been made in the State of Florida, was executed in compliance with the laws of Florida, the court could properly have sustained the motion, upon the authority of our former decision upon that point. Though the paper may have been written and signed by the mortgagor, it may not have been executed according to law. *Calhoun v. Calhoun*, 81 Ga. 93 (6 S. E. 913).

The copy of the mortgage which appears in the bill of exceptions is attested by two witnesses, but neither of them purports therein to be such an officer as is authorized by the law of Florida to attest a mortgage; nor does the witness Wixelbaum, who saw the mortgage signed, testify that he knew either of these witnesses to be such an officer. Perkins, who he says was carried to the place where it was signed, for the purpose of witnessing its execution, he had just then met for the first time; and the other witness, Mr. Brown, is shown by uncontradicted testimony to have been at the time the attorney for the mortgagee. Construing the evidence with relation to the execution of the mortgage most favorably to the defendant, the most that was shown was that one who was qualified by law to complete the execution of the mortgage as an attesting officer failed to perform that duty, and only signed his name individually.

In the motion which is quoted the objection was made that the testimony in relation to the mortgage, and the mortgage itself, were both irrelevant to the issue; and thus, for the first time in the case, is raised the question as to whether it is within the power of an officer, after he has levied a process of the court, to make any binding agreement with reference to the disposition of the property levied upon which would be at variance with his duty. There is some slight difference between the testimony in behalf of the plaintiff and that of the defendant as to the exact terms of the bailment under which the former turned the property upon which he had levied into the possession of the latter. It is conceded, however, by all parties that Pepper, as a constable, after having levied an attachment upon the property, consented for James to receive it

upon deposit, and that James knew the facts. Unless an officer can make, at his discretion, a disposition of property which he has seized under the mandate of a court, different from or contrary to its usual legal course, it would be contrary to public policy to permit him to defeat the due process of the law by an agreement of his as to the possession of the property by another, no matter of what nature that agreement might be. In other words, unless Pepper, as a constable, was authorized to fix the legal rights and liabilities of Harris, the plaintiff in the attachment which he had levied, by an agreement with James that the latter should hold the property levied upon until the termination of some other litigation, and that Harris would abide its result, it would be utterly irrelevant what agreement he made in that regard, and therefore entirely immaterial, as a matter of law, whether there was conflict between the parties as to the terms of this agreement, which, if contrary to public policy, would necessarily be a nullity. We have no doubt that it was in this view of the case that the trial judge held that all the evidence in relation to the mortgage was irrelevant; and, doubtless holding also, for the same reason, that the testimony as to the terms of the agreement (the agreement being contrary to public policy) was insufficient to present any issue in the pending action of trover, he directed the verdict in favor of the plaintiff. As we have already stated, this point was not presented when the case was here before, or it would have resulted in a termination of the litigation; for we are satisfied that the decision of the trial court in the case at bar was correct. It would not seem to require a citation of authorities to demonstrate that a levying officer, as such, has no power, by his agreement, to increase or diminish the rights of a litigant in whose behalf the processes of a court have been invoked and are being executed.

When this case was here before, in ruling upon the exception presented by the cross-bill, in which it was insisted that the levy was void for indefiniteness, we held (7 *Ga. App.* 521), that "even if the entry of levy was void, the constable would be liable, and it would not lie in the mouth of his bailee . . . to dispute the title of his bailor, or to assert that by reason of the invalidity of the act by which the bailor came into the possession of the bailment he is released from liability to return the property deposited with him for safe-keeping. 'The bailee can not justify his refusal on the

ground that the bailment is illegal. Although the bailor may have had no legal authority to make it, and even though it were made for the purpose of fraudulently secreting the goods from the bailor's creditors, yet the bailee is bound to restore at the demand of his bailor, and will not be permitted to set up the illegality of the bailment as an excuse for his own default. So far does this principle obtain, that although the title to the goods be in the bailee, and even though he may have received them in ignorance of his own right, having accepted the possession of them in the capacity of bailee, he is estopped from claiming them by title until he has fulfilled the obligations of the trust by returning them to his bailor.' "

But if authority directly upon the point is needed to establish the statement that it is contrary to public policy for a levying officer to make a bailment which by possibility could defeat the legal result of the processes he is charged to execute, the principle is established in the decisions of many of our courts of last resort, that while a levy is of full force and virtue, a levying officer can not make any contract divesting himself of dominion over the property, except under such replevy or forthcoming bond as is prescribed by law.

In *Burrall v. Acker* (N. Y.) 23 Wendell, 606 (35 Am. Dec. 582), the court says that while it is perfectly legitimate for a levying officer to store property with a receiptor or custodian, any agreement with such person that the property shall be absolutely his upon paying the amount of the execution would be illegal and contrary to the rights of the defendant in execution; and an agreement which would place the property absolutely beyond the reach of the sheriff before a sale thereof at public auction would be equally illegal and contrary to the duty of the sheriff in reference to the plaintiff's right. No public officer can bargain away his power to discharge his official duty. *Cole v. Parker*, 7 Iowa, 167 (71 Am. Dec. 439); *Harrington v. Crawford*, 136 Mo. 467 (38 S. W. 80, 35 L. R. A. 477, 58 Am. St. R. 653); *Hodsdon v. Wilkins*, 7 Greenleaf, 113 (20 Am. Dec. 347). A receiptor or custodian in such case is but the servant or agent of the levying officer. He has no property in the chattels; he can not maintain trover for them in his own name. He can not set up a title to the property in a third person. He can only defend a trover suit against him on behalf of the officer on the

ground that the property has been taken from him by act of law, or, possibly, by force. *Phillips v. Hall*, 8 Wendell, 610 (24 Am. Dec. 113); *Denny v. Willard*, 11 Pickering, 519 (22 Am. Dec. 391); *Pettee v. Marsh*, 15 Ver. 454 (10 Am. Dec. 689).

Judgment affirmed.

3338. HANSFORD *v.* NATIONAL BANK OF TIFTON.

1. A national bank is a corporation, the powers of which are defined and limited by the acts of congress authorizing the creation of such banks.
2. The decisions of the United States Supreme Court are ultimate and paramount authority as to the powers and liabilities of national banks.
3. A national bank can not authorize or ratify an act absolutely *ultra vires*, committed by its agents or officers.
4. Neither the directors nor other officers or agents of a national bank have authority to institute prosecutions for violations of the public criminal laws of the State, or to cause requisition papers to be issued for alleged criminals. Such acts are entirely beyond the scope of the powers of a national bank, and liability does not attach against the bank for any attempt on the part of its directors, officers, or agents to exercise any such powers on its behalf.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Tifton—Judge Eve. March 6, 1911.

C. C. Hall, Claude Payton, for plaintiff.

Fulwood & Murray, for defendants.

POWELL, J. Hansford sued the National Bank of Tifton for damages, alleging that the defendant procured one Bailey to swear out a warrant charging the plaintiff with the offense of carrying concealed weapons, to cause requisition papers to be issued thereon, whereupon the plaintiff was arrested and imprisoned in the State of Florida. It is alleged that the bank's officers knowingly and maliciously had this process issued, without probable cause, and for the purpose of extorting from him a sum of money.

1. It is useless to enter upon any discussion of the question as to whether corporations may commit torts; it is well settled that they may. Hence, no doubt, there are some corporations that may commit the torts of false imprisonment and malicious prosecution. This general question is not here involved. The specific question is as to the powers of a national bank, and as to its capacity to com-

mit the particular tort alleged in the petition. National banks are corporations of limited capacity. They have no powers except such as are given them expressly or by necessary implication by the acts of Congress passed in relation to that subject. *Logan County Natl. Bank v. Townsend*, 139 U. S. 67 (35 L. ed. 107).

2. Whenever the power or liability of a national bank is called into question, necessarily a Federal question is involved, and consequently the United States Supreme Court is the ultimate and paramount authority on the subject; and all authorities of State courts to the contrary must yield. *California National Bank v. Kennedy*, 167 U. S. 362 (42 L. ed. 198). These institutions are so far governmental agencies of the United States as that neither State statutes nor State decisions can impose any liability inconsistent with the liability intended by the Federal statutes, as construed by the Supreme Court of the United States. An examination of the decisions of the Federal courts on this subject discloses that the Federal government is vigilant and jealous to protect the assets of these banks from diversion from those purposes for which these institutions are organized. The safety of these national banks, and the keeping of their resources unimpaired from diversion by the acts or omissions even of their own officers and agents, is a matter of Federal concern.

3. If an agent or an officer of a national bank, with or without the consent of its board of directors, commits an act which entirely transcends the scope of its powers and objects of existence, the individuals participating in the act are solely responsible for its consequences, and the national bank is not. The board of directors and other officers are likewise impotent to ratify any act *ultra vires* in its nature, or to make the bank take any benefit therefrom. *California National Bank v. Kennedy*, *supra*.

4. The act of which liability is predicated in the present case was that certain officers or agents of this national bank procured one Bailey to swear out a warrant charging Hansford with carrying concealed weapons, upon which the solicitor of the city court made application to the Governor of this State for a requisition, which was duly honored by the Governor of Florida, who issued a warrant, upon which the plaintiff was arrested; it being alleged that the object of all this was illegally to extort a sum of money from the plaintiff. If the allegations are true, this was a great wrong,

a wrong for which these officers and agents and all others participating in the illegal project are jointly liable as tort-feasors. But it is an affair so utterly foreign to every purpose for which a national bank is organized as to make it absolutely beyond the powers of the officers or agents of such a bank to impose a liability upon it for these acts. Under the ruling in the California bank case, *supra*, which is consistent with a line of authorities similar in their nature, a national bank could do no such act, and could not ratify the act of others, even by receiving money which came as a result of it. No matter how far State courts may extend the liability of corporations organized under State laws, or subject solely to State jurisdiction, a determination of powers and liabilities of national banks is not to be extended by any State court, so as to make them responsible for any such transaction as the one at bar. We say this because we recognize that there are a number of State precedents by which ordinary corporations might be held liable in such a case. The court did not err in dismissing the action against the bank on general demurrer.

Judgment affirmed.

3336, 3337. ROBERTS *v.* NATIONAL BANK OF TIFTON.

These cases are controlled by the decision this day rendered in *Hansford v. National Bank of Tifton*, ante, 270.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Tifton—Judge Eve. March 7, 1911.

C. C. Hall, Claude Payton, for plaintiff.

Fulwood & Murray, for defendant.

POWELL, J. While in particular facts these cases differ somewhat from the case of *Hansford v. National Bank of Tifton*, in general principle they are covered by it. In these cases the prosecution was for cheating and swindling, whereas in that case it was for carrying concealed weapons. Both of these offenses are simply violations of penal laws of this State, with the enforcement of which national banks have no concern whatever.

Judgment affirmed.

3344. SEABOARD AIR-LINE RAILWAY *et al.* v. HUNT.

1. The evidence authorizes the verdict.
2. Under the Civil Code (1910), §§ 2782 et seq., an employee (or one in his right) suing for injuries inflicted upon him by the alleged negligent acts of fellow servants in railway employment is not barred from recovery by his contributory negligence, unless it amounts to a failure to exercise ordinary care.
3. Contributory negligence on the employee's part may consist in a violation of a valid rule promulgated by his employer. However, when an employer offers in evidence a rule, for the purpose of showing that the employee has been guilty of negligence by violating it, the employee may avoid the effect of it by showing that the master made it, not in good faith and with the intention that it should be obeyed, but merely for the purpose of shielding himself behind it in the event that an employee, who was expected to violate it, should be injured; or may show that the employer has waived or abrogated the rule by knowingly allowing continuous and customary violations of it by his employees generally.
- (a) Where a railway company promulgates rules for the guidance of its employees, they will be most strongly construed against the company, and if it be doubtful whether they cover the act in question, they will not be sufficient to render that act, if committed by the servant, negligence per se.
- (b) If it be at all doubtful as to whether the rule was intended to apply to a particular kind of service, and it is shown that both before and after its promulgation that service had been, with the master's knowledge, constantly performed by the employees in violation of the terms of the rule, the evidence of the practice of the employees in this respect is relevant, not only (where a waiver of the rule is relied on) to prove the waiver, but also to aid in the construction of the rule itself.
4. Depositions taken under provisions of the Civil Code for use in a pending case may, in the discretion of the court, be read in evidence, notwithstanding the presence of the witness at the trial.
5. For the court to state to the jury the allegations of the petitioner and the insistences of counsel is not violative of the code section against the judge's expressing or intimating an opinion upon the facts.
6. The trial was free from error, and no reason appears for granting a new trial.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Cordele—Judge Strozier.
March 23, 1911.

W. H. McKenzie, E. A. Hawkins, for plaintiff in error.

F. G. Boatright, J. T. Hill, contra.

POWELL, J. Hunt was a yardmaster in the service of the defendant company at Cordele. On July 10, 1910, which was Sunday, he received instructions to switch certain cars containing

perishable freight, in order that their forwarding might be expedited. In order to place these cars, what is known as a "flying switch" was made. Hunt was on the foot-board of the engine, for the purpose of unloosing the freight-cars from the engine, in order that they might take one track while the engine took the other. A switchman was placed at the switch-stand, in order to turn the switch between the time of the passage of the engine and the time of the passage of the cars. As the engine was passing over the switch it became derailed and threw Hunt from it, and he fell in such manner that, in his efforts to extricate himself, he got into a position in which the moving freight-cars struck him, ran over him, and killed him. His widow sued the railroad company, its section foreman, the engineer in charge of the locomotive, and the switchman who handled the switch. The grounds of negligence alleged were: (1) that the section foreman had allowed the switch-points to become so worn that the switch "split" when the engine ran over it; (2) that the switchman moved the switch while the engine was upon it, so that the forward wheels took one track while the other wheels took the other; (3) that the engineer was running at an excessive speed, so that when the switch was "split" by reason of its worn condition, or by reason of its being moved by the switchman, the injury occurred. The company was also charged with negligence on account of each and all of the acts of these separate employees. At the trial the plaintiff abandoned the charge of negligence as to the worn condition of the switch, and dismissed the section foreman from the case. The jury found a verdict against the company and the switchman, exonerating the engineer. This verdict, in the light of the charge of the court and of the evidence, is necessarily to be construed as a finding that the only act of negligence established was that the switchman moved the switch while the engine was in passage over it, and that the engineer was not guilty of operating the train at an excessive speed. This fact renders it unnecessary for us to discuss or decide some of the points made in the record, relating solely to the other features of the case which were eliminated by the jury's finding in favor of the company as to all grounds of negligence except the act of the switchman. The defendants found liable, having made a motion for a new trial, which was overruled, bring error.

1. Without going into details, it is sufficient to say that the

evidence was in conflict as to whether the switchman moved or could have moved the switch while the engine was in passage. On this point the verdict is conclusive. The only other question raised by the general grounds is whether the plaintiff himself was guilty of such contributory negligence as to bar a recovery on his part. Without enlarging upon the discussion of this question at present, we will simply say that the evidence was such as to justify the verdict, and that the verdict is not without evidence to support it. The case was determinable not under the old law which required an employee, or one suing on his behalf, to show that he was free from fault, or he could not recover for an injury inflicted by the act of a fellow servant, but was governed by the new rule, now embodied in the Civil Code (1910), §§ 2782-7.

2. The plaintiffs in error contend that there was no issue as to the plaintiff's contributory negligence; that concededly he was guilty of such contributory negligence, amounting to a failure to exercise ordinary care, as to bar a recovery under the Civil Code (1910), § 2783. Under that section, contributory negligence amounting to a failure to exercise ordinary care will absolutely bar recovery, while contributory negligence of a less degree will diminish the recovery.

3. The insistence of counsel is that inasmuch as the petition alleges that the plaintiff was engaged in making a "flying switch" at the time he met his death, and inasmuch as it was shown on the trial that the company had a rule, known to him and agreed to by him, prohibiting the making of a "flying switch," his engagement in that act was necessarily contributory negligence, and was as a matter of law the proximate cause of his injury. The defendant in error resists this contention with the counter-contention that the making of the "flying" switch was a remote, and not the proximate, cause of the injury, that the proximate cause was the switchman's negligent act in turning the switch under the engine. Also, that the rule upon the subject did not apply to switch engines shifting cars in the yards, but only to trains, in the sense wherein that term is defined in the rules of the company; and further, that if any such rule was ever applicable to the plaintiff, it had been abrogated by reason of the company's allowing its continuous and constant violation by its employees. We are of the opinion that it was probably a question for the jury as to

whether the making of a "flying" switch was or was not so connected with the act of the switchman as to make it at least a part of the proximate cause. But be this as it may, there was certainly enough evidence in the record to justify the jury in finding that this practice of making "flying" switches had gone on for such a length of time and with such knowledge on the company's part as to indicate that the rule was not made for the purpose of having it obeyed, and that if it ever had validity, it had been waived. No proposition is better settled by this court and by the Supreme Court than that if a railroad company makes rules, not for the purpose of having them obeyed, but merely for the purpose of shielding themselves behind them in the event that an employee is injured in violating them, the rules will be disregarded by the court; and further that an abrogation or waiver of the rule may be established by proof that it was constantly and continuously violated with the knowledge of those officers whose duty it was to enforce it, and with their apparent acquiescence. In this case the particular rule was promulgated in 1908, but a similar rule had been in effect previously, and continuous violations of it were shown both before and after the year 1909. Specific objection was made to the evidence tending to show a violation before 1908, and also to such of the evidence as tended to show a violation after the death of the employee in this case. But we think that this evidence was admissible. It is doubtless true that a railway company, having promulgated a rule and having allowed it to become abrogated by allowing its violation, but being desirous of stopping the practice forbidden by it, may re-promulgate the rule, notifying the employees thereafter that obedience will be insisted upon, and may thus give validity from that time forward, so as to make a further violation of it negligence on the employee's part, provided that the company does thereafter in good faith insist on obedience. But where, under the rule as originally promulgated, customary violations took place with the company's knowledge, and thereafter the same rule is again promulgated and no change of practice is insisted on, and the same practice of violation continues, the inference becomes almost irresistible that the second promulgation was intended to have no greater effect than the first promulgation had,—that the company did not intend in good faith to enforce it. The past attitude of the company becomes strongly illustrative of its attitude under the rule as

reissued. Besides, it is not at all clear in this case that this rule ever had applicability to a yard engine. Of course, the general doctrine is that the rules are to be construed most strongly against the company promulgating them. In the rule book of the company this particular rule forbidding running switches was known as rule No. 104 (e), and appeared under the head of "Movement of trains." These same rules give a set of definitions by which the particular rules are to be construed, and the following definitions are to be found: "Train: An engine, or more than one engine coupled, with or without cars, displaying markers." "Yard Engine: An engine assigned to yard service and working within yard limits." And rule No. 18 provides that "yard engines will not display markers," thus evincing an intention that a yard engine is not to be regarded as a train, while working within yard limits (as the engine in the present case was working). And if rule No. 104 (e) relating to "flying" switches refers only to the movement of trains, as it seems to do by being placed under that head, it was not the intention of the rules to forbid such engines, working within yard limits, from making "flying" switches. It is true that this same rule appeared in the time-table furnished to employees, but this time-table itself made reference to the general rules of the company and purported to quote largely from them, and it seems only fair to construe the rules as found in the time-table in connection with the rule as found in the rule book. The jury were, therefore, authorized to find that the company did not intend for this rule to apply to its yard engines, this inference being supported both by the ambiguous form in which the rule was promulgated and by the practice of the employees of making "flying" switches in the yards with the knowledge of the company's officers. This being so, it can not be said that the making of the "flying" switch was the proximate negligent cause of the injury. The jury might have found that in the absence of a rule on the subject the making of a "flying" switch was negligence, but this question was fairly submitted to them and they found to the contrary. And, as we have said before, the jury found that the immediate cause of the injury was the switchman's negligent act in turning the switch under the engine as it was passing. In this view, the making of the "flying" switch was a mere condition of the injury and the negligent turning of the switch the juridic cause. This disposes not only of one phase

of the question presented by the general grounds, but also controls a number of the special grounds of the motion for a new trial.

4. The testimony of one of the witnesses for the plaintiff had been taken by deposition. The defendant objected to this deposition being read, because the witness was present in court; the insistence being that he should have been put upon the stand, that he might be subjected to cross-examination. The point is directly ruled against the plaintiff in error by the Supreme Court in the case of *W. & A. R. Co. v. Bussey*, 95 Ga. 584. The party taking the depositions has the right to read them, notwithstanding the presence of the witness at the trial; and if the opposite party desires to cross-examine the witness, it is his privilege to call him to the stand for that purpose.

5. Error is assigned upon the court's stating to the jury the contentions of the plaintiff as made in her petition and as insisted on by her counsel at the trial, the insistence being that this is violative of the statute which prohibits the judge from expressing any opinion upon the facts of the case. It has been repeatedly held that this form of instruction is not violative of the statute.

6. There are several assignments of error relating to the refusal of certain written requests to charge. We have examined these carefully in connection with the general charge, and we find that, so far as they were pertinent and legal, they were fully covered. Indeed, the charge of the court is one of the most magnificent presentations of the law governing cases of this character that it has ever been our privilege to review. It was full, fair, lucid, and errorless. In fine, the case was fairly tried throughout; and while the verdict (for \$15,000) is rather large, it is not excessive or beyond what the evidence authorizes. We see no ground for setting it aside.

Judgment affirmed.

3351. NIX v. BRUTON.

RUSSELL, J. Whenever a suit is brought on an open account verified as provided by law, the defendant's plea must either deny that he is indebted in any sum, or specify the amount in which he admits he is indebted, and must be verified. Civil Code (1910), § 4728. The plaintiff having verified his account, and the defendant's answer not being verified, it

was not error to strike the answer and enter judgment for the plaintiff; the defendant not offering to amend by verifying.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Bainbridge—Judge Harrell.
March 22, 1911.

L. W. Nelson, for plaintiff in error.

John R. Wilson, contra.

3354. BRIDGES *v.* PHILLIPS.

RUSSELL, J. 1. The court erred in granting a nonsuit, for it was at least issuable whether the plaintiff paid the note for the principal debtor, or bought it and held it as a bona fide purchaser. The phrase "take up the note" does not any more strongly imply that the debt evidenced by the note is to be finally discharged than that the person "taking up" the note will assume the place of the original payee or holder, with the privilege in that event of being subrogated to all pre-existent rights of the former holder.

2. The defendant was not entitled to notice of non-payment or of protest. So far as appears from the papers sued upon, the note was not made for the purpose of negotiation nor intended to be negotiated at a chartered bank, and it is evident, from the form of the transfer or assignment of the note, that the indorser was not an accommodation indorser, but that he sold the note to the bank, and stood, so far as it was concerned, in the position of the original maker.

Judgment reversed.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Miller county—Judge Bush.
March 13, 1911.

R. L. Z. Bridges sued D. Phillips, as indorser, on a note made by George Owens, payable to Phillips, and indorsed as follows: "For value received I transfer and assign to Bainbridge State Bank the within note and mortgage, with full recourse on me. Dec. 13th, 1905. [Signed] D. Phillips." "For value received we transfer the within note and mortgage to R. L. Z. Bridges, without recourse on us. March 5th, 1906. [Signed] Bainbridge State Bank, by E. J. Perry, Cashier." The note was dated December 13, 1905, and was payable one month after date, and certain personal property was mortgaged to secure its payment. The suit was filed in 1910. The defendant pleaded payment; also that the plaintiff had taken possession of the mortgaged property; and that the plaintiff had failed to make timely demand upon him for payment,

and had failed to use due diligence to collect the debt. At the trial the plaintiff testified, that "he took up the note at the Bainbridge State Bank, at the request of George Owens, the maker, who lived on his place at the time; that D. Phillips and George Owens some time afterward came to him and D. Phillips requested that he delay the matter of foreclosing on the mortgage, and [said] that he would arrange to pay all . . . George Owens owed him; that he delayed foreclosing the mortgage and suing the note for that reason; that the Bainbridge State Bank did a banking business;" and that he had never received any of the property set out in the mortgage. A nonsuit was granted, on motion of the defendant, at the conclusion of the plaintiff's evidence; and the plaintiff excepted.

*Russell & Custer, Bush & Stapleton, W. O. Fleming, for plaintiff.
P. D. Rich, for defendant.*

3358. GEORGIA AUTOMOBILE CO. v. MERCHANTS NATIONAL BANK.

RUSSELL, J. The presiding judge being dissatisfied with the verdict, and having granted a first new trial, one of the grounds of the motion, among others, being that the verdict was contrary to law and evidence, this court will not control his discretion in so doing; nor will this court consider assignments of error based upon his charge to the jury, or upon his refusal to direct a verdict, the presumption being that on the second hearing he will correct his own errors, if there be any.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Levy and claim; from city court of Forsyth—Judge Cabaniss.
March 8, 1911.

Persons & Persons, for plaintiff in error.

Willingham & Willingham, Tye, Peebles & Jordan, contra.

3359. SMITH v. WORLEY, executor.

1. Where a creditor of a non-resident of this State sued out an attachment, and caused an ordinary garnishment to be served upon a resident of this State, and, on the trial of an issue formed upon the garnishee's answer, it appeared that, before the summons of garnishment had been served, the defendant had transferred his claim against the garnishee to another non-resident creditor, as security for a claim of

less amount (the transfer, however, being a total, and not a partial, transfer of the debt), *held*, that such garnishment, unaided by any equitable pleading, was ineffectual to reach the surplus coming to the defendant in attachment after satisfying the creditor holding the transfer as to the debt due him.

2. A deed of bargain and sale does not, by failure to record it, lose its priority as to a creditor of the vendor, subsequently obtaining a lien by attachment or common-law judgment.
3. Lawful registration entitles a deed to admission in evidence without proof of its execution, in the absence of an affidavit of forgery, though the registration be not made until after suit is pending.

DECIDED JANUARY 15, 1912.

Garnishment—appeal; from Elbert superior court—Judge Walker. March 15, 1911.

By the will of A. G. Worley, which was probated in 1907, his widow took an estate for life, and after her death the property was to be equally divided between his seven children, except that his son G. A. Worley was to account for a difference of \$150.91. The part of the estate which would have come to this son amounted to \$3,150.91. On December 1, 1910, after the widow's death, G. A. Worley executed and delivered to S. G. Worley, his brother, a deed in ordinary form, in which was conveyed the grantor's "whole interest, as an heir, in and to the estate of A. G. Worley, of Elbert county, Georgia, for and in consideration of the sum of \$2,500." This conveyance was executed before two witnesses, and acknowledged by G. A. Worley before a justice of the peace at Miami, Florida, and on February 27, 1911, was recorded in the office of the clerk of the superior court of Elbert county, Georgia. On the back of the conveyance was written: "Accepted the within deed, December 7, 1910. J. N. Worley, executor estate of A. G. Worley." The deed was reacknowledged in due form of law before the clerk of the circuit court of Dade county, Florida, a court of record, on March 2, 1911, and was rerecorded in the clerk's office of the superior court of Elbert county, Georgia, on March 10, 1911. On January 31, 1911, Smith (the plaintiff in error) sued out an attachment before a justice of the peace in Elbert county against G. A. Worley, on the ground that he was a non-resident of the State, and caused it to be executed by service of summons of garnishment upon J. N. Worley, the executor of the estate of A. G. Worley. The executor answered that he had no assets in his hands belonging to G. A. Worley. The answer was traversed, and on the trial S. G. Worley testified that the consideration of G. A.

Worley's deed to him was that G. A. Worley owed notes aggregating \$2,500, on which he, the witness, was indorser, and which he, at the time of the execution of the deed, agreed to pay and did pay. He admitted that there was a tacit understanding between him and G. A. Worley that if he received from the executor more than enough to reimburse him, he would give the overplus to G. A. Worley. It further appeared that at the time this conveyance was made, the estate of A. G. Worley consisted of lands, but after its execution and before the levy of the attachment it had been converted into money, as the result of an executor's sale. These facts being undisputed, the court directed a verdict in favor of the garnishee.

Z. B. Rogers, for plaintiff.

Worley & Nall, contra.

POWELL, J. (After stating the facts.)

1. Unless the deed by which G. A. Worley conveyed his interest in his father's estate to his brother was void, or for some reason ineffectual, as against the rights of the attaching creditor, the judgment of the trial court is correct, irrespective of any equitable rights that may have existed owing to the fact that the interest of the defendant in attachment may have been greater than the amount represented in the consideration of the deed by which he conveyed his interest to his brother. This is settled in principle by the case of *Howard v. Porter*, 99 Ga. 649 (27 S. E. 725), where it is held that, in this class of cases, garnishment unaided by any equitable pleadings is ineffectual to reach the surplus coming to the defendant in attachment after his transferee, though holding for security only, has been satisfied.

2. The deed as first executed was not properly attested or acknowledged; its first record was ineffectual. The plaintiff contends, therefore, that it was void, and that it took no precedence over his rights as an attaching creditor. Our registry law as contained in the Civil Code (1910), § 3320, does not apply to contests between deeds and liens, other than liens obtained by contract. A valid deed, though unrecorded, is superior to a subsequent judgment or attachment against the same property. *Donovan v. Simmons*, 96 Ga. 340 (22 S. E. 966). The proposition is too well settled in this State to require an enlargement of discussion, or a citation of authorities to the effect that a deed is not invalid for lack of registry or recordation.

3. The filing and recording of a deed upon proper attestation or acknowledgment gives it two advantages over an unrecorded deed. The one is to prevent its postponement to the rights of third persons acquiring subsequent conveyances or contract liens binding against the same property; and the other is to authorize its introduction in evidence without further proof of its execution. We have just shown that there was no need for record, so far as this plaintiff was concerned, as affecting the question of priority; but the further point is made here that the court erred in admitting this deed in evidence, since it was not properly recorded until after the suit was pending. It will be recalled, from the statement of facts prefacing this opinion, that it having been discovered that the prior attestation and record were ineffectual, the grantee caused the deed to be properly acknowledged, and to be rerecorded shortly prior to the time of the trial. It was upon this reacknowledgment and rerecordation that the judge admitted it in evidence without further proof of its execution. The point is made that a case is to be tried according to the rights of the parties at the commencement of the suit. This is generally true, so far as relates to substantive rights of the parties, but has no reference to mere matters of evidence. The competency of evidence and the methods of making proof are determinable as of the time of the trial, and not as of the time of filing the suit. For instance, a deed less than thirty years old at the date of the filing of the suit, which becomes as much as thirty years old during the pendency of the suit and prior to the trial, may be introduced in evidence at the trial as an ancient deed, and without proof of its execution. We find no error.

Judgment affirmed.

3360. PATRICK v. HENDERSON.

The evidence, with all reasonable deductions and inferences therefrom, did not absolutely demand the verdict for the defendant, and it was error to direct the verdict.

DECIDED JANUARY 15, 1912.

Trover; from city court of Monticello—Judge Thurman. March 25, 1911.

A. Y. Clement, for plaintiff. Greene F. Johnson, for defendant.

HILL, C. J. Patrick sued Henderson in trover, to recover "one black horse mule 5 years old, medium size." After hearing the evidence the trial judge directed a verdict for the defendant; and the plaintiff excepted. The facts are as follows: On January 10, 1906, Lucian Benton sold the mule in question to William Harris, taking therefor a purchase-money note reserving title, which was duly recorded. This note is credited with a payment of \$104.71, dated October 28, 1907. On October 24, 1908, Benton transferred the note, after maturity, to Patrick, with Benton's right and title to the mule. Some time in the spring of 1908 Harris, without the knowledge or consent of Benton, exchanged the mule to Jones, for a horse, and gave a mortgage on the horse to Phillips. Harris, having traded the mule for a horse, and having the latter in his possession, executed to Benton a note for \$104.02, with a reservation of title to the horse in Benton, and Benton transferred this note, with the reservation contract, to Patrick. Jones, to whom Harris traded the mule for the horse, sold the mule to Henderson. Subsequently the horse was sold by Phillips under his mortgage, and bought by Patrick for \$69. Patrick, claiming title to the mule, brought the suit against Henderson. When the deputy sheriff went to serve bail process on Henderson, he did not find the mule in Henderson's possession, but Henderson told him that "he could get the mule all right" and that he (Henderson) would go to him the next day and settle the matter; whereupon the officer, with the consent of Patrick, did not execute the process. Henderson failed to produce the mule or to settle the case. The value of the mule was proved to be at least \$200, and that of the horse \$69.

It was contended by the defendant that as Benton had transferred the purchase-money note reserving title, after maturity, to Patrick, the transferee had no greater rights than the transferor, and that as the evidence showed that Benton had taken the note for the horse in lieu of the note for the mule, the title to the mule was lost, and therefore Patrick could not recover the mule from Henderson. It was also contended that the evidence showed that Henderson did not have possession, custody, or control of the mule at the time of the filing of the suit and when the demand was made on him for the mule, and he had not converted the mule, and that for this reason also there could be no recovery. The judge took this view of the evidence and directed a verdict for the defendant.

We do not think the evidence, with all reasonable deductions or inferences therefrom, was so clear and unequivocal on both points as to demand the verdict for the defendant. Unquestionably Patrick had no greater title to the mule than Benton had, but as Benton's contract reserving title to the mule was duly recorded, he had title until the note was paid or in some way settled. If Benton accepted the note for the horse with reservation of title, in lieu of the note for the mule with reservation of title, which he subsequently transferred to Patrick, and it was so understood by both Benton and Patrick, the right to recover the mule was lost; for the horse was substituted for the mule. But if the jury could have reasonably inferred from the evidence that Benton was simply endeavoring to protect himself and his transferee as to the mule transaction, the mule being more valuable than the horse and having been sold by Harris, and that the horse note was collateral security for the mule note, then Patrick would still have title to the mule. In our opinion the evidence is not so clear and unequivocal on this point as to demand the finding that the horse note was taken, not as collateral, but as a substitution for the mule note; and this question should have been submitted to the jury. Civil Code (1910), § 5926; *Broughton v. Aiken*, 7 Ga. App. 318 (66 S. E. 809).

We think also that the question whether the defendant had possession, custody, or control of the mule was in some doubt, under the evidence. Two or three days before the suit was brought he was seen to have the mule in his possession, and on the night when the officer, in company with the plaintiff, went to serve bail-process, he admitted that, while he did not have the mule in his possession at that time, "he could get it," and agreed that "if they would give him until to-morrow, he would settle it." The jury might have inferred that while he did not have the mule in his actual possession, it was where he could get it, or that he was playing for time to eloin the mule so as not to have it forthcoming. Even if he did not then have possession, custody, or control of the mule, but had previously gotten possession of it with legal knowledge of Benton's recorded title, and with this knowledge had disposed of it, this was a conversion so far as the superior right of Benton was concerned, if he had not lost his right to the mule in taking the note for the horse. *Miller v. Wilson*, 98 Ga. 567 (25 S. E. 578,

58 Am. St. R. 319); *Merchants & Miners Transportation Co. v. Moore*, 124 Ga. 482 (52 S. E. 802). The case should have been sent to the jury, and the direction of a verdict for the defendant was erroneous.

Judgment reversed.

3370. ESTEVE BROTHERS & CO. v. ROSENGRANT.

HILL, C. J. 1. A bill of sale to staves, stating the number sold, where located, their length, and the number of staves of each length, and that 44 per cent. were made of red oak, and that all were to be shipped from the place where located to designated consignees, was not void for uncertainty in its description of the property. This description pointed out with sufficient definiteness and certainty the property sold, and any deficiencies as to identity could be supplied by parol. *Thomas Lumber Co. v. T. & C. Furniture Co.*, 120 Ga. 879; *Beaty v. Sears*, 132 Ga. 516; *tiedeman on Sales*, § 233.

2. No error of law appears, and the evidence fully supports the verdict.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Trover; from city court of Savannah—Judge Davis Freeman. February 13, 1911.

O'Byrne, Hartridge & Wright, for plaintiff in error, cited, *Ferguson v. McCowan*, 124 Ga. 669

Wilson & Rogers, contra.

3371. HAMMOND v. JACQUES.

RUSSELL, J. It not appearing to the satisfaction of the court that the opposite party was served with notice of the depositions admitted in evidence, and it subsequently appearing, upon the hearing of the motion for a new trial, that the attorney who was notified did not in fact represent the defendant at the time that the notice of the taking of the depositions was given to him, it was not error to grant a new trial.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Bail-trover; from city court of Bainbridge—Judge Harrell. March 21, 1911.

R. G. Hartsfield, Will H. Krause, for plaintiff.

Russell, Fleming & Custer, for defendant.

3382. MARTIN v. DUNBAR.

- RUSSELL, J. 1. The right of a jury to determine the truth of an issue in case of conflict in the testimony is not dependent upon or affected by the number of witnesses testifying on the one side or the other. In this case the verdict is supported by evidence which fully authorized the finding of the jury, and is approved by the trial judge.
2. The assignment that the court erred in misstating the contentions of the parties is not supported by the record. It appears in the record that counsel for both parties agreed in open court that the only real issues involved were as they were afterwards stated by the court in his charge; and therefore it was not error for the judge, in his instructions to the jury, to state the contentions of each party, as each admitted them to be, although the oral admission differed from the pleadings in the case; especially for the reason that while the statement of the court varied the amount contended for by each party in his pleadings, it did not affect the nature of the suit, or the defense, and therefore could not confuse the jury. Nor could the jury have been confused by the court's incorrectly stating the amount claimed by the plaintiff in his petition, because the court, in the same connection, referred the jury to the pleadings.
3. The error of the court in stating to the jury that they should determine a certain point "from the testimony of witnesses on the stand" (without referring at that time to the consideration of the jury certain testimony which had been submitted by interrogatories) was harmless, in view of the fact that the court, later on in the charge, called specific attention to the interrogatories, and told the jury it was their duty to consider that evidence along with other testimony in the case.
4. This court can not review the ruling of the lower court upon the admissibility of testimony, when it is not made to appear what objections to the testimony were urged in that court.
5. Assignments of error not referred to in the brief of counsel will be treated as abandoned.
- Judgment affirmed.*

DECIDED JANUARY 15, 1912.

Complaint; from city court of Fitzgerald—Judge Wall. December 12, 1909.

A. J. McDonald, Griffin & Griffin, for plaintiff in error.

Haygood & Cutts, contra.

3384. MILLER GROCERY CO. v. EASTPORT SARDINE CO.

HILL, C. J. The allegations of the petition were not proved as laid, and it affirmatively appears, from the evidence for the plaintiff, that the offer to buy, made to the defendant by letter, was expressly refused and no complete contract was entered into. A nonsuit was therefore properly awarded.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Attachment; from city court of Albany—Judge Crosland. February 21, 1911.

R. J. Bacon, Ben T. Burson, for plaintiff.

Mann & Milner, for defendant.

3385. DOUGLAS, AUGUSTA & GULF RAILWAY COMPANY *v.* PENNINGTON & EVANS.

The effect of the rulings of this court upon the bill of exceptions and the cross-bill when the case was here before was to finally dispose of the case then pending; and consequently all the orders of the lower court looking to the perfecting of service by publication subsequently to the judgment making the remittitur the judgment of that court were nugatory and void.

DECIDED JANUARY 15, 1912.

Action for penalty; from city court of Douglas—Judge McDonald. March 2, 1911.

William H. Barrett, Quincey & McDonald, for plaintiff in error.
Spencer R. Atkinson, Hendricks & Christian, contra.

RUSSELL, J. This case came to this court at the October term, 1907, and the decision will be found in 3 *Ga. App.* 665 (60 S. E. 485). Afterwards the case came before us again, on bill and cross-bill of exceptions, and the judgment of the court below was reversed, because we held that the action should have been dismissed for lack of service. 6 *Ga. App.* 854 (65 S. E. 1084). The cross-bill of exceptions was dismissed because of the dismissal of the main bill. In the latter judgment, upon motion of counsel, this court directed that, since the trial court was without jurisdiction, on account of lack of service, to deal with the case in any way, the order of the lower court in sustaining the demurrer and dismissing the action should, for the same reason, be vacated. There is nothing in the ruling upon the cross-bill in conflict with the ruling upon the main bill. In ruling upon the main bill we ruled that the lower court should have dismissed the action because of lack of service, and, of course, if the action should have been dismissed for lack of service, any ruling on demurrer, in advance of service of the petition, was nugatory and void. The sole purpose of giving the direction which was entered was to allow the plaintiffs, if they desired, to recommence their suit, "without prejudice to the parties

as to the questions of law involved," and these words were used in the formal judgment of the court. After the remittiturs from this court were returned and made the judgment of the lower court, that court ordered service to be perfected by publication, and thereafter passed other orders to that end, one extending the time in which publication might be completed, and another declaring that service had been perfected by publication. The effect of our decisions was to give the plaintiff, if we could, an opportunity of commencing a new suit which would not be prejudiced by any prior ruling upon any of its features; but, so far as the judgments of this court themselves are concerned, it is very evident that they resulted in putting the case then pending entirely out of court and finally disposing of it. For this reason the court erred in holding that service had been legally perfected. No case was pending in which service could be perfected. The judgment of the city court of Douglas itself, making the judgment upon the remittitur the judgment of that court, had ordered the action dismissed.

Judgment reversed.

3402. QUEEN INSURANCE CO. v. PETERS, administratrix,

1. The judgment of the United States circuit court remanding a case to the State court from which it has been removed is final, and it is the duty of the State court to receive jurisdiction and proceed with the trial.
2. Courts will draw every reasonable deduction to uphold contracts of insurance. A contract of fire insurance issued in the name of a dead man as the insured will not for that reason alone be held invalid. Unless it appears to the contrary, the company will be presumed to have known the fact that the person named as the insured was dead, and that the contract was made for the benefit of the person or persons representing the estate. And especially is this true where the policy itself expressly provides that, "Wherever in this policy the word 'insured' occurs, it shall be held to include the legal representatives of the insured."
3. The administrator on the estate of the insured is the proper personal representative to sue on a policy contract issued in the name of the intestate.
4. Where the amount of the verdict was substantially less than the amount claimed in the proofs of loss and sued for, a verdict for attorney's fees and damages was unauthorized. Besides, the question of law involved in the present case was sufficiently doubtful and important to rebut

the existence of bad faith on the part of the company in its refusal to pay the policy, and in contesting its validity.

DECIDED JANUARY 15, 1912.

Action on insurance policy; from city court of Moultrie—Judge McKenzie. March 24, 1911.

King & Spalding and Underwood, for plaintiff in error.

J. A. Wilkes, Shipp & Kline, contra.

HILL, C. J. Mrs. Beulah Peters, administratrix of M. Mathis, sued the Queen Insurance Company upon a policy of fire insurance issued in the name of M. Mathis, covering a building and the furniture therein. The verdict was for plaintiff for \$1,300 on the building, \$250 as attorney's fees, and 12½ per cent. damages. At the proper time application was made to remove the case to the circuit court of the United States, upon the ground of diversity of citizenship. The judge of the State court refused to pass an order of removal, being of the opinion that the attorney's fees sued for under the Civil Code (1910), § 2549, were a part of the costs, and could not be computed in calculating the necessary jurisdictional amount. There was no exception to this judgment of the State court. Subsequently the record was filed in the United States court, and, on a hearing before the judge of that court, the case was remanded for trial to the State court, Judge Speer concurring in the view of the former court; and, over objection by the defendant, the case proceeded to trial in the State court.

The evidence is not in conflict, and, briefly stated, is as follows: The policy of insurance sued upon was issued by the Queen Insurance Company on January 2, 1908, in the name of "M. Mathis" as the insured, no other person being mentioned, nor any words of description added. The fire which destroyed the property covered by the policy took place on December 8, 1909. The policy was in force at the time of the fire. On February 1, 1909, the plaintiff, Mrs. Beulah Peters, was duly appointed administratrix upon the estate of M. Mathis, who was dead when the policy was issued, having died in January, 1897. He left surviving him a widow and six children, the plaintiff being one of them, and the widow was in life when the suit was filed. M. Mathis left no debts, and left other property besides that covered by the policy. No other administration was ever had upon his estate. Except proof of the value of the property insured and destroyed, and

what would constitute reasonable attorney's fees, no oral testimony was introduced. The documentary evidence consisted of exemplified copies of letters of administration, deeds showing title to the property in M. Mathis, the policy of insurance declared upon, proofs of loss, by the administratrix, an agreed statement as to the removal proceedings, and admissions of death of M. Mathis, relationship, etc., recited above. While there are several grounds of error in the motion for a new trial, all of them can be properly condensed into two: (1) as to the jurisdiction of the court; (2) as to the validity of the policy contract.

1. We do not deem it necessary to decide the question of jurisdiction, or to determine whether the attorney's fees claimed should be regarded as costs or as damages. In view of the language of the statute of this State in allowing the recovery of 25 per cent. on the liability, in addition to the loss, and the decisions of this court and of the Supreme Court, we are inclined to think that attorney's fees allowed in such cases are a substantive part of the damages and are not "costs." Civil Code (1910), §§ 2549, 5992; *Missouri Insurance Co. v. Lovelace*, 1 Ga. App. 449 (6), (58 S. E. 93); *Traders Insurance Co. v. Mann*, 118 Ga. 385 (45 S. E. 426). Irrespective of this question, however, the decision of the learned Judge presiding in the United States Circuit Court is final on the subject of jurisdiction. *Peters v. Queen Ins. Co.* (C.C.), 182 Fed. 112. Even if the judge of the State court had granted an order of removal when the application was made to him, it was the duty of that court, when the Federal court remanded it to the State court, to receive jurisdiction and proceed as if the erroneous order of removal had not been granted. 4 Fed. Stat. Annot. 258, 259, and citations. In other words, the jurisdiction of the State court would not have been lost, but only suspended; and when the case was remanded, the question of jurisdiction was finally settled. We do not mean to say that the defendant, when the application to remove was refused in the State court, could not have preserved exceptions pendente lite, or that when the judge of the Federal court remanded the case to the State court for trial, an appeal could not have been had to the United States Circuit Court of Appeals. But neither was done, and the question of jurisdiction is settled by the decision of the Federal court remanding the case to the State court for trial.

2. Was the contract valid? The plaintiff in error says not, because M. Mathis was dead when the policy was issued, and a dead man can not contract, and there must be "parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject-matter upon which it can operate." Civil Code (1910), § 4222. Certainly the insurance company made a contract of insurance with some one. It received from some one the premiums as a consideration for the contract, and there was the property insured as the subject-matter. It may be conceded that a "dead person" can not make a contract. But can not a person having an insurable interest in the property make a contract of insurance in the name of the dead person, for the benefit of his estate, or of some one having an insurable interest in the property covered by the contract? Would not the "other party" to the contract, who had paid the company the premium, or the party having an interest in the property, be the applicant for the insurance? As matter of common knowledge, we know that business is frequently continued in the names of individuals or firms long after the individuals, or all the members of the original firm, have died. Is it unusual, unreasonable, or illegal for the heirs of an estate before division, or the legatees before distribution, or the legal representatives of an estate, to continue the business and to make contracts in the name of the testator or intestate? It can not be doubted that if the insurance company in the instant case had knowledge when the policy was issued that "M. Mathis" was dead, and knew who were the real parties at interest, it would be bound. It could not in good faith, with such knowledge, make the contract and receive the premium and then deny the validity of the contract.

Every reasonable intendment and every reasonable presumption must be indulged, to uphold the contract. Is it unreasonable that the company should be deemed to know with whom it contracted, and whether M. Mathis was then alive, or, if dead, whether the person who paid the premium was presumptively interested in the property? The evidence does not positively disclose who did in fact take out this policy, or who paid the premiums. Probably M. Mathis during life took out the original policy and his children and heirs renewed it from year to year in his name. There had been no division of the estate. We hold it fairly inferable that

some person with an insurable interest in the property made the contract with the company and paid the premiums, in the absence of positive evidence to the contrary, and we are unwilling to declare the contract of insurance invalid at the instance of the insurance company. *It was alive*, made the contract, received consideration therefor in the premium, and the loss insured against admittedly occurred. To declare the contract invalid would certainly damage the "other party." To uphold it can not damage the company, for it agreed to pay the loss to the one having an insurable interest in the property or to his personal representatives, and the contingency insured against happened.

Besides, we think the provisions of the policy contract itself cover the very question now discussed. The policy expressly provides: "Wherever in this policy the word 'insured' occurs, it shall be held to include the legal representatives of the insured." We are aware that this provision is inserted in policies of insurance to meet any change in the title caused by the death of the insured; but it is broad enough to embrace the facts of the present case. Under this provision the contract was made not only for the benefit of the "insured," but for his "legal representatives." Here the facts show that the plaintiff is not only the "legal representative" of the insured, but is part owner of the property insured, in both capacities having an insurable interest. This clause in the policy establishes a privity between the company and the legal representatives of the insured. Where no hurtful fraud is proved in the procurement of a contract of insurance, and the premiums are paid at the time of the loss, the company should be held to performance, unless some reason stronger than mere technical objection is presented, and one demanded by substantial justice and clear law. We conclude that the trial judge did not err in holding that the contract was valid.

3. Neither do we think that there was any necessity to reform the contract, or that the administratrix was not the right party plaintiff. We presume, from the fact that an administratrix was appointed, in view of the admission that the intestate left no debts, that the estate had not been settled by consent of the heirs. The administratrix was the personal representative of the intestate, to collect debts due the estate. Indeed, we think the insurance company could legally have required the appointment of an administrator before paying the loss. Under the Civil Code (1910), §§ 3657,

3929, 3933, and the decision in *Greenfield v. McIntyre*, 112 Ga. 691, the heirs of the intestate insured could not bring suit on the policy without alleging and proving that there was no administration.

4. The verdict for attorney's fees and damages was not warranted, for two reasons: First, the amount claimed to be due on proof of loss and sued for was \$1,500, and the verdict was for \$1,300. This was equivalent to finding that the company was justifiable in resisting the claim. *Southern Mutual Insurance Co. v. Turnley*, 100 Ga. 303 (27 S. E. 975); *Liverpool &c. Insurance Co. v. Ellington*, 94 Ga. 785 (21 S. E. 1006), *Travelers Insurance Co. v. Sheppard*, 85 Ga. 765 (2), (12 S. E. 18). The evidence did not show bad faith in refusing to pay the loss, and the legal questions made were sufficiently doubtful and important to warrant the company in contesting the suit. The judgment is affirmed, with direction that the plaintiff write off from the judgment the amount recovered as attorney's fees and damages.

Judgment affirmed, with direction.

3405. CHICAGO CRAYON CO. *v.* BAKER *et al.*

POWELL, J. The evidence was sufficient to authorize the verdict, and no material error of law in the instructions to the jury appears.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Action; from city court of Tifton—Judge Eve. April 15, 1911.

Fulwood & Murray, J. B. Murrow, J. J. Murray, for plaintiff.
Ridgill & Griner, L. P. Skeen, for defendants.

3407. SMITH *v.* JEWETT.

RUSSELL, J. The court did not err in awarding a nonsuit. Section 4411 of the Civil Code (1910), dealing with representations made to obtain credit for another, provides that "No action shall be sustained for deceit in representation to obtain credit for another, unless such misrepresentation be in writing, signed by the party to be charged therewith."

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Action for deceit; from city court of Macon—Judge Hodges.
March 13, 1911.

R. D. Feagin, O. C. Hancock, J. F. Urquhart, for plaintiff.
Guerry, Hall & Roberts, for defendant.

3409. STIMPSON SPECIALTY CO. v. PARKER.

- HILL, C. J. 1. "Where machinery is bought for a certain purpose, and after its reception it proves, upon trial, not to be adapted to the purpose, but the purchaser nevertheless retains it, an action for the price can not be defeated upon a plea of total failure of consideration, unless the evidence shows that the machinery was wholly valueless for any purpose." *Harder v. Carter*, 94 Ga. 482 (19 S. E. 715).
2. A plea of total failure of consideration, to an action upon a promissory note given for the purchase-price of a "sausage mill, No. 40 coffee mill," is not supported, unless the evidence shows that the mill was entirely worthless as a sausage mill, or as a coffee mill; and especially is this true where the written contract of purchase fails to disclose that the mill was intended to be used solely as a sausage mill, and not as a coffee mill, and the evidence also fails to show in what particulars the mill was defective, either as a sausage mill or as a coffee mill, and it does appear that it was worth as a coffee mill the amount of the purchase-price for which the note was given and on which the suit was brought.
3. To support a plea of total failure of consideration to a suit on a promissory note given for the purchase-price of machinery, the defendant must establish by evidence that the machinery purchased by him was entirely worthless for any purpose; the jury would not be authorized to render a verdict giving the defendant the benefit of a partial failure of consideration, in the absence of any data from which a reduction could be made from the contract price, although a plea of total failure of consideration includes a plea of partial failure of consideration. *Grier v. Enterprise Stone Co.*, 126 Ga. 17 (54 S. E. 806); *Clegg-Ray Co. v. Indiana Scale & Truck Co.*, 125 Ga. 558 (54 S. E. 538).

Judgment reversed.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Tifton—Judge R. Eve. April 3, 1911.

The Stimpson Specialty Company sued Parker on a promissory note given by him for the purchase-price of a machine described in the contract of purchase embodied in the note as a "sausage mill, # 40 coffee mill." The defendant filed a plea of total failure of consideration, in which he set up that the mill was bought as a sausage mill, and not as a coffee mill, and that it was worthless for

the purpose for which it was bought. The contract does not disclose whether the mill was to be used exclusively as a sausage mill or as a coffee mill, or for both purposes. The defendant assumed the burden of proof as to the plea of total failure of consideration, and testified, that he bought the machine "to be used solely as a sausage mill;" that he endeavored to use it as a sausage mill, but was unable to do so, for when it was put in operation the "gear gave way," and he was unable to run it, and it was not suited for the purpose intended; that he had never ran a machine of this kind before; that about two weeks after the machine had been received he "showed it to . . . the agent" who had sold it to him, and this agent "agreed to write to his house about it;" that he did not use the machine for the purpose of grinding coffee, and did not know whether it would have done that work; if the machine had been sold as a coffee mill for \$175, he presumed it was worth that amount. When the machine was delivered, it had no attachment for grinding coffee, although it was actually made for the purpose of grinding coffee, and the sausage attachment was afterwards put on. Another witness testified, that he was present when the machine was received, and that he and the defendant put it up, but that they were never able to use it for grinding meat; that the raw-hide gear was not sufficient to run the mill; that "it was completely worn out and mashed together." There is no evidence that the defendant, on discovering the defects of the machine or that he was unable to operate it as a sausage mill, made an offer to return it or rescind. So far as appears, he kept the machine from the time he received it until the suit was filed (about six months), without complaint further than may be inferred from his statement that he showed the mill to the agent, "who agreed to write to his house about it."

The judge (who, by consent, tried the case without the intervention of a jury) rendered judgment in favor of the defendant; and the plaintiff excepted.

R. D. Smith, for plaintiff.

Fulwood & Murray, for defendant.

3419. JOWERS v. HIGH POINT FURNITURE CO.

1. Ordinarily, only those standing in the relation of creditors at the time of the transfer can attack a transfer of property, on the ground that it was made to hinder, delay, or defraud creditors. If subsequent creditors desire to attack the transfer on that ground, they must show that at the time they extended credit they had no notice of the transfer, and that they were, by some fraud, actual or constructive, induced to extend credit on faith of the ownership of the property. *First Natl. Bank v. Bayless*, 96 Ga. 684 (23 S. E. 851); *Sims v. Albee*, 72 Ga. 751; *Horn v. Ross*, 20 Ga. 210 (3), (65 Am. Dec. 621); *Hagerman v. Buchanan*, 45 N. J. Eq. 292 (17 Atl. 946, 14 Am. St. Rep. 732, and monographic note appended thereto).
2. A sale of property, if otherwise bona fide made, is not void as to a pre-existing creditor of the vendor merely because he retains the possession after the sale.

DECIDED JANUARY 15, 1912.

Levy and claim; from city court of Fitzgerald—Judge Wall.
March 16, 1911.

Haygood & Cutts, for plaintiff in error

McDonald & Grantham, contra.

POWELL, J. This is a claim case. The plaintiff in fi. fa. attacked the validity of a sale of the property in dispute by the defendant in fi. fa. to the claimant. The time of the creation of the plaintiff's debt does not appear. If it came into existence after the time of the sale, the judgment in the plaintiff's favor must be reversed, because the charge of the court in certain particulars complained of was contrary to the principle stated in the first headnote above. If it was pre-existing at the time of the sale, the court should not have given the following instruction: "If you should find that T. M. Parsons [the defendant in fi. fa.] ever owned the personal property levied on, and if you find that he afterwards sold it, but he remained in possession of the property, and the plaintiff in fi. fa. had no actual notice of the sale, but relied upon Parsons' possession, then, if you find these facts to exist, you would be authorized to find the property subject." It is to be noticed that this instruction omits all reference to the element of fraud, or intention to hinder or delay the creditor, in the absence of which the sale might be valid as against the pre-existing creditor, notwithstanding the vendor retained the physical possession or custody of the property.

Judgment reversed.

3423. MAYOR AND COUNCIL OF MACON v. MORRIS.

1. The evidence, though apparently preponderating against the verdict, is nevertheless not legally inadequate to make the finding of the jury conclusive on this court as to the facts of the case.
2. Where territory is lawfully annexed to a city, the new area becomes "a part of the city for all municipal purposes," and the public highways therein become streets of the city, and the city becomes chargeable with the duty of using reasonable diligence in seeing that they are placed and kept in such condition as will make passage thereon reasonably safe. As to defects existing in the highway at the time of the annexation, the city does not become chargeable with liability until it has discovered them, or, in the exercise of ordinary and reasonable diligence, should have discovered them, and until it has then had a reasonable opportunity to remedy them.
 - (a) What is a reasonable time or opportunity in these respects is ordinarily a question for the jury, to be determined upon a consideration of all the illustrative facts as they may appear.
3. Policemen, unless what may be called their common-law duties have been enlarged, are mere peace officers not chargeable with the duty of observing or inspecting condition of the city highways; and, in such cases, are not channels for the communication of implied notice to the city of defects in a street; but the city may enlarge their powers by ordinances, rules, or instructions affecting their employment and putting on them the duty of inspecting for and of reporting as to defects; and, in that event, notice and negligence may be implied through them.
 - (a) A like rule applies as to employees of the sanitary department. Primarily they would be concerned only with matters relating to the public health; but the city may put on them the duty of observing and reporting the condition of other things (e. g. the condition of drains and sewers in the highways); and, in that event, notice and negligence may be implied through them.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Macon—Judge Hedges. April 22, 1911.

On March 4, 1910, certain contiguous suburbs of considerable area were annexed to the City of Macon, as a result of an election held under a special act of the General Assembly. In this new territory were a number of highways which had been previously kept up by the county authorities; and one of these was known as Giles street. Early in the night of March 11, 1910, Mrs. Morris, the plaintiff, started to the home of her sister, who lived on Giles street. She had never previously been on the street. She left the street-car at a near-by point, and, while going down Giles street on what was not, strictly speaking, a sidewalk, but was a part of the street (on its edge nearest the property line), which

was commonly used by pedestrians, she fell into an unguarded sewer-opening and was injured. The contour of the street surface was such as to hide the opening from any one approaching from the direction from which she came, especially at night, but could easily be seen by any one approaching from the opposite direction. The danger of the situation was inherent in the method of its original construction by the county authorities. She sued the city for damages because of her injury, and recovered a verdict for \$1,000. No negligence on the plaintiff's part is asserted; it is also practically conceded that the sewer was originally constructed and maintained by the county authorities in a negligent way; the defense of the city is that it did not know of this defect in the highway and that it had not had control over this new territory long enough for negligence to be imputed to it for not discovering and relieving the dangerous situation. The case comes to this court on exceptions of the city, the overruling of a demurrer to the petition, and to the refusal of a new trial.

Lane & Park, for plaintiff in error.

J. F. Urquhart, John P. Ross, Akerman & Akerman, contra.

POWELL, J. (After stating the foregoing facts.)

1. If we had the power of a trial judge as to granting a new trial on the facts of a case, we would grant one in this case. If we had been on the jury we would not have found the city liable. There are in the record complete photographs of the scene of the injury, and when we look at them and see how little there was to attract any immediate attention to the danger incident to the method in which this sewer had been located and constructed; when we consider what short time the city had for looking over its vast newly-acquired area and for discovering and remedying such previously existing conditions as were likely to cause hurt therein; when we ask ourselves if any body of prudent men, situated as the municipal body of Macon was situated, would likely have discovered and remedied this particular defect in the mere week's time that had elapsed between the date of the annexation of the territory and the date of the injury, it seems to us that the jury's finding of negligence rests on a very meager basis. But it is nothing new for us to say that the jurisdiction of the jury to settle the facts is as final as is this court's jurisdiction to determine the law; and their finding of fact is entitled to the same respect from us as our decision

on the law is entitled to receive from them. And no doubt, if a reciprocity of criticism were allowable, some of our decisions as to the law would seem as absurd to the jurors as their finding of facts seems to us in this case. There is a point at which facts cease to be issuable and the jurisdiction of the jury is withdrawn for the lack of anything for them to decide; when all the evidence and all the inferences to be drawn therefrom so irresistibly point to only one way as to leave no "scope for legitimate reasoning by the jury," and the only conclusion deducible from the facts is a matter of law, which the court may declare; but we can not say that that point has been reached in this case. Hence, we must abide by the finding of the jury, as much as it may shock us.

2. When the borders of the City of Macon were so enlarged as to take in new territory, that territory became at once "a part of the city for all municipal purposes;" and such public highways as had been previously maintained therein became city streets; and the city became chargeable with the duty of using reasonable care and diligence to place them in reasonably safe condition for public passage. *City of Columbus v. Ogletree*, 102 Ga. 293 (29 S. E. 749). As to dangerous and defective conditions existing in the highways at the time of the annexation, the city did not become chargeable with liability until after it had discovered them, or until after such a length of time had elapsed that in the exercise of ordinary diligence it should have discovered them, and after it had then had reasonable opportunity to take the necessary steps to remedy them. The case of *City of Richmond v. Mason*, 109 Va. 546 (65 S. E. 8), is relied on by the plaintiff in error. The decision in that case is very strongly written, and runs along the line that a city does not become immediately liable for the defective condition of highways in annexed territory; that it must have a reasonable time in which to discover and then to remedy such conditions; that even five months may not be an unreasonable length of time for that purpose; that what is a reasonable time is a mixed question of law and of fact. It is to be seen that the ruling there is perfectly consistent with what we are now deciding. In that case the verdict in the plaintiff's favor was set aside, because the trial court refused to allow the city to show the recency of the annexation and the extent and condition of the new area, and to show what it had done to remedy conditions therein. In the present case proof of all these things

was allowed by the trial court and was passed on by the jury under full, fair, and appropriate instructions.

3. The other serious question in the case is as to how far the city was responsible for the failure of its sanitary inspectors and its policemen to acquire knowledge of the dangerous condition of this sewer, which was not a part of the city's system of sanitary sewerage, but was used for surface drainage. As to the sanitary inspectors, the city code put on them the duty of daily general sanitary inspection of "the condition of streets, sidewalks, pavements, and street gutters, and the relative level of lots and streets, and the system of drainage and sewers, in every lot, street and alley." Also, in a book denominated on its title page as the "Rules and Regulations adopted by the Mayor and Council of the City of Macon for the Government of the Department of Police of said City," and which, according to the testimony, was the official book of rules kept in the headquarters of the police department and furnished to the policemen by the mayor and council for their guidance, were two rules requiring policemen to observe the condition of streets, sidewalks, and alleys, and to report anything likely to produce danger. In *City of Columbus v. Ogletree*, 96 Ga. 177 (22 S. E. 709), it is decided that unless the city has enlarged what may be called the common-law powers of its policemen, they are mere peace officers, charged with no duty respecting the condition of streets and sidewalks, and that therefore they are no such agents of the city as to be channels for the communication of implied notice of defects in the streets. In the same case, as reported in 102 Ga. 293 (29 S. E. 749), it is held, that "An ordinance making it the duty of policemen to report to the lieutenants of police all footways, bridges, and sidewalks requiring repairs, necessarily renders it incumbent on the lieutenants to report upon the same to the authorities whose duty it is to have the needed repairs made; and therefore, under such an ordinance, notice to a policeman or a lieutenant of a defective or dangerous place in a sidewalk is notice to the city." It seems that a like rule should apply as to sanitary inspectors. Primarily the sanitary department is concerned only with matters affecting the public health, but its officers may be charged by action of the city council with the further duty of observing and reporting other matters.

Now, the city can not discharge the duty it owes the public

of being reasonably diligent to discover defects in its streets without having some agents or agent to perform the service of observation and inspection. It is a very appropriate service to place upon the police department. Likewise, so far as the safety of the streets for public passage is affected by the location and condition of drains, sewers, and culverts, it is an appropriate service to require of the employees in the department having drains and sewers in charge. We do not think that the court erred in allowing these ordinances and rules to be read in evidence, or in submitting to the jury the question as to whether notice to the city, and negligence, were to be implied through these employees. A distinction is asserted between ordinances placing the duty of inspection on policemen, and mere rules or instructions issued to the police department to the same effect. We see no reason for making a difference. The important thing is that this was one of the methods resorted to by the city of performing its duty of acquiring knowledge of the condition of its streets. It is plain, from the evidence, that policemen in Macon were employed with respect to these rules, and that the governing body of the city was accustomed to act upon the reports made under them. No one can read the testimony on this subject in the record and doubt that the policemen of Macon are more than mere peace officers.

There are some assignments of error in the record which we have not taken up for discussion; but they are either controlled by the points that have been discussed, or are of too small importance to justify the grant of a new trial, even if they are well taken.

Judgment affirmed.

3425. MATTHEWS v. THE STATE.

RUSSELL, J. The evidence is insufficient to rebut the presumption that the barn was accidentally burned. Further, in the absence of any evidence showing that the prosecutor's statements in regard to the defendant's lack of financial credit had been communicated to him, no motive on the defendant's part to burn the barn is disclosed.

Judgment reversed.

DECIDED JANUARY 15, 1912.

Indictment for arson; from Monroe superior court—Judge R. T. Daniel. April 8, 1911.

Willingham & Willingham, for plaintiff in error, cited: *Ga. Reports*: 57/482; 85/535; 86/357; 93/557; 97/209; 103/430; 109/158, 516; 110/293; 111/139; 117/235; 119/118; 123/278; 125/741; *Ga. App. Reports*: 2/492; 3/653; 6/105, 776; 7/197.

J. W. Wise, solicitor-general; *Persons & Persons*, contra.

3426, 3427. *THOMPSON v. MARSH CYPRESS Co., and vice versa.*

HILL, C. J. The evidence for the plaintiff did not prove the allegations of negligence as laid in the petition. Admitting all the facts proved and all reasonable deductions therefrom, the negligence alleged against the master as the basis of liability not only was not shown, but it affirmatively appeared that the injury was caused by the negligence of a fellow servant and the concurring negligence of the plaintiff himself. The nonsuit was properly awarded. Civil Code (1910), § 5942.

Judgment on main bill of exceptions affirmed; cross-bill dismissed.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Waycross—Judge Lankford presiding. January 19, 1911.

Meyers & Edwards, Hendricks & Christian, for plaintiff.

Wilson, Bennett & Lambdin, Shepard Bryan, for defendant.

3429, 3430. *RIVERSIDE MILLING AND POWER Co. v. SEABOARD AIR-LINE RAILWAY, and vice versa.*

RUSSELL, J. The court did not err in sustaining the general demurrer and dismissing the plaintiff's petition. The petition, as amended, was fatally defective, in that it did not appear therefrom that it was within the power and authority of the defendant to grant the milling-in-transit privilege. Under the act of Congress of June 29, 1906, c. 3951, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892; Supp. 1909, p. 1149), regulating interstate transportation, a carrier could not grant this special contract, unless the rate had been approved by the interstate-commerce commission. The petition did not allege that the special milling-in-transit privilege, at the special rate mentioned, had been established by the defendant and included in the schedule of rates, and published as required by the act of Congress above referred to, nor allege that such privilege or the rate mentioned was open to all shippers under like conditions, or that the charges agreed to be made on the interstate transportation mentioned had been fixed and regulated in accordance with

law, and, therefore, that the defendant was under duty to the plaintiff to make shipments for it in accordance with the contract.

Judgment affirmed. Cross-bill of exceptions dismissed.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Cartersville—Judge Foute. March 23, 1911.

The Riverside Milling and Power Company sued the railway company, alleging, in substance, that on or about March 29, 1907, certain cars loaded with corn and billed to the plaintiff arrived in Cartersville, Georgia, from Kansas City, via the defendant's railroad, but, as the corn had been ordered delivered over a different line of railroad, the plaintiff was not obligated to accept it when tendered on the defendant's tracks; that on being notified that these cars of corn were in Cartersville, the plaintiff inquired of the defendant whether the defendant would protect transit on said cars, "transit" meaning milling-in-transit privileges, which would allow the plaintiff the right to take the corn and convert it into meal and ship it in its manufactured state to other points on a much lower rate than the rate for shipment of meal originating in Cartersville; and, on April 4, 1907, the defendant notified the plaintiff that it would accord the plaintiff milling-in-transit privileges at Cartersville, as to the corn in these cars; and, after receiving this notice, and relying upon milling-in-transit privileges being accorded, and upon its ability to dispose of the meal manufactured from this corn at the market price, without loss, if such privileges were accorded, the plaintiff accepted the cars of corn, ground the corn into meal, and sold and reshipped it. The defendant, however, after the corn had been ground into meal, refused to accord to the plaintiff the milling-in-transit privileges promised, and required the plaintiff to pay the same rate of freight on the meal as would have been required had the corn originated at Cartersville. The plaintiff had made contracts for the sale of the meal and shipped it, before it was notified that the defendant would refuse to accord milling-in-transit privileges. The defendant, by representing to the plaintiff that it would accord such privileges, induced the plaintiff to purchase the corn and contract for the sale of the meal, and caused the plaintiff the loss of \$160, for which the plaintiff sues, this sum being the difference between the amount of the freight, demanded by the defendant and paid by the plaintiff on this meal, and the amount which should have been paid at milling-in-transit

rates. It is alleged that if the defendant had not promised to accord milling-in-transit rates as stated above, the plaintiff would not have paid the freight or accepted the corn, not being obligated so to do. The petition specifies the points to which the meal was shipped, and the freight rates, and gives the name of the defendant's agent who informed the plaintiff that it would be allowed milling-in-transit privileges; and copies of the bills of lading are exhibited.

A general demurrer to the petition was sustained, and the plaintiff excepted. The defendant filed a cross-bill of exceptions, alleging error in the overruling of a special demurrer.

G. H. Aubrey, for plaintiff, cited: *Savannah, Florida & Western Ry. Co. v. Bundick*, 94 Ga. 778; *Georgia Railroad v. Creety*, 5 Ga. App. 427.

Brown & Randolph, Neel & Neel, for defendant, cited: *Georgia Railroad v. Creety*, supra; Barnes on Interstate Transportation, §§ 253-6, 418, 463.

3431. EARLY COUNTY v. BAKER COUNTY.

CONYERS, J. The Supreme Court, upon the constitutional question certified, having held (137 Ga. 126, 72 S. E. 906) that the secretary of State, acting under sections 473, 474, and 475 of the Political Code (1910), was exercising a function of a political, and not of a judicial nature, it follows that the judgment of the lower court must be *Affirmed*.

DECIDED JANUARY 15, 1912.

Certiorari; from Fulton superior court—Judge Bell. March 22, 1911..

POWELL, J., being disqualified, Judge Conyers, of the Brunswick circuit was designated to preside.

The question certified by the Court of Appeals to the Supreme Court was whether the provisions of the act of 1899 as to determination of the boundary line between counties where disputed (Civil Code of 1910, §§ 473, 474, 475) are repugnant to the constitution of Georgia (article 1, section 1, paragraph 23), as being an attempt to confer judicial power upon the secretary of State.

Pope & Bennet, R. H. Sheffield, for plaintiff in error.

A. S. Johnson, Benton Odom, contra.

3440. PATTERSON v. GEORGIA, FLORIDA & ALABAMA
RAILWAY CO

The action being for breach of contract, and the evidence not authorizing the conclusion that the minds of the parties (who negotiated with each other by correspondence) ever met upon the same thing in the same sense, and, therefore, there being no proof that a contract ever existed between them, judgment was properly rendered in favor of the defendant.

DECIDED JANUARY 15, 1912.

Action on contract; from city court of Bainbridge—Judge Harrell. March 13, 1911.

R. G. Hartsfield, for plaintiff. *J. R. Pottle*, for defendant.

RUSSELL, J. This case was submitted to his honor Judge Harrell, of the city court of Bainbridge, for his determination without the intervention of a jury, and, after a consideration of the evidence, the court rendered judgment in favor of the defendant. The action was for damages claimed by reason of the alleged breach of a contract of sale, under which the plaintiff became the purchaser of a certain canning plant. The negotiations were between Patterson, the plaintiff, who resided in Greenville, Tenn., and O'Dell, who was the general manager of the defendant at Bainbridge, Ga., and were all carried on by correspondence, which is contained in the record. The plaintiff testified by interrogatories, from which it appears that the parties had never met in person. Numbers of letters were exchanged and several telegrams. The correspondence began by a letter from O'Dell to Patterson on February 5, 1908, and continued without intermission of more than two or three days until April 5, 1908. It can not serve any useful purpose to detail its contents. It may be said that Patterson first took an option. He did not comply with that option, and still the correspondence was continued, and the contract might have been created even after the expiration of the option, if it was not apparent that the minds of the parties never did meet upon the same thing in the same sense. There was disagreement as to what was actually to be delivered, and much correspondence over this, without any definite understanding. There is likewise apparent, all through the correspondence, a determination on the part of each party to insist upon his own preference as to the method of payment. O'Dell insisted, each time that he referred to it, that payment should be made at Bainbridge, and Patterson as often insisted that O'Dell

should draw on him through either bank in Greenville, and he gave references as to his complete solvency. It would be fruitless to refer to the number of minor matters in the correspondence which indicate continual contention, rather than fixed concurrence of opinion, in regard to the details of the proposed bargain. If the statement of O'Dell that the canning plant was complete could have been insisted upon by Patterson (and, of course, the delivery of a complete plant could have been demanded if the other terms of the first proposal had been complied with), still there had been no definite acceptance by Patterson of O'Dell's offer prior to the time that O'Dell notified Patterson that some of the machinery or equipment was missing, and, of course, after that time, if the parties had traded at all, O'Dell's first offer of a complete canning factory must be deemed to have been withdrawn, and is qualified by the later statement that some of the accessories of the canning factory had been stolen. As Patterson did not know what parts were missing, and continually expressed a desire for transportation to come and investigate, it could not thereafter be said that the minds of the parties had agreed, or could agree on what was actually to be sold by the one and purchased by the other.

Judgment affirmed.

3448. ATKINSON, receiver, v. FOUNTAIN.

- HILL, C. J. 1. The charge, considered in its entirety, presented clearly and correctly, and most favorably to the contentions of the defendant, the law applicable to the issues made by the pleadings and evidence. Portions of the charge, to which exceptions are taken, when considered separately from the context, contain slight inaccuracies, but could not have confused or misled the jury, and, when considered in connection with the charge as a whole, are without any material error.
2. Persons crossing the track of a railroad company at a public-road crossing are entitled to the protection of the statutes regulating the approach of locomotives and cars to the crossing, no matter how the road or crossing came into existence; and there was evidence from which the jury could have inferred that the plaintiff was injured at a public crossing by the negligence of the defendant in the violation of these statutes.
3. Irrespective of the question whether the plaintiff was injured at a public crossing or at a private crossing, there was evidence that he was injured by the defendant in running its train at too high a rate of speed, and in failing to exercise ordinary care and diligence at the place of

the injury, especially in view of the proof that it was frequently used by the public with the knowledge of the defendant company.

4. No error of law appears, and, in the light of the injuries shown, the verdict (for \$600) was small and amply supported by the evidence.
Judgment affirmed.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Fitzgerald—Judge Wall.
April 26, 1911.

Bolling Whitfield, Elkins & Wall, for plaintiff in error.

L. Kennedy, McDonald & Grantham, contra.

3449. CITIZENS BANK OF FITZGERALD v. BENTON.

1. If an agent is employed in order to obtain the benefit of his expert knowledge or skill in any particular business or profession, he may be clothed with discretion as to the time, quantity, and nature of service to be rendered by himself; and in such case he is liable alone for the proper exercise of this discretion for the benefit of his principal. Where one agrees to exercise his skill as an expert in determining whether anything should be done, and, if so, what, or to decide that nothing is necessary to be done, as the case may be, this agreement is a sufficient consideration to support a contract obligating the opposite party to pay for such services; and the contract may be just as valid as if the duties to be performed were minutely specified.
2. In any contest over the performance or non-performance of such a contract, of course, the legal maxim, "id certum est quod certum reddi potest," would control. There was no error in overruling the demurrer.

DECIDED JANUARY 15, 1912.

Action on contract; from city court of Fitzgerald—Judge Wall.
March 25, 1911.

L. Kennedy, for plaintiff in error, cited: *Ga. Reports*: 1/220; 101/188; 115/408; 121/312, 716; 73/570; 101/810; 119/6 (3); 123/707, 710; 125/676 (4); 39/548; 46/278; 7 *Ga. App.* 276; 14 *Wis.* 630; 23 *Wend. (N. Y.)* 435; *Clark, Cont.* 10, 64; 7 *Am. & Eng. Enc. L. (2d ed.)* 114, 116; 17 *Am. & Eng. Enc. L. (2d ed.)* 4.

Otis II. Elkins, contra, cited: 20 *Am. & Eng. Enc. L. (2d ed.)* 49; 26 *Cyc.* 1021; 9 *Cyc.* 250; 49 *N. J.* 92; 1 *L. R. A. (N. S.)* 448.

RUSSELL, J. The Citizens Bank of Fitzgerald, on March 31, 1906, by a resolution of its stockholders, appointed L. O. Benton as financial agent of the bank for a term of five years expiring March 31, 1911. In the resolution it was stipulated that Benton was to be paid \$500 a year for his services as financial agent. Ben-

ton's duties were prescribed as follows: "His duties as said agent shall be to examine and check the books, papers, and business of the bank at such times as he may see proper, either personally or by agent, to make financial connections and secure correspondents for said bank, and in general to do and perform all acts that he may deem necessary or expedient for the successful operation of said bank." Something more than two years later the Citizens Bank of Fitzgerald went into liquidation, its business being taken over by another bank; and on April 3, 1911 (the period for which the contract was made having expired), Benton brought suit for \$1,500, for three years salary which he had not received.

The defendant filed a demurrer, in which it is insisted generally that the petition does not set forth any cause of action, and also that the alleged contract upon which the suit was based was unilateral, and void for want of mutuality and for lack of consideration. The demurrer raised also the point that it was not alleged that the plaintiff ever performed or offered to perform any service after March 31, 1908. The court overruled the demurrer, and the present writ of error is brought to test the correctness of that judgment. The only point worthy of serious consideration, raised by the demurrer, is the inquiry as to whether the contract is so lacking in mutuality as to avoid it. In the argument of counsel for the plaintiff in error it is stressed that "Mutuality of contract means that an obligation must rest on each party to do something in consideration of the act or promise of the other, that is, neither party is bound unless both are bound." And the rulings in *Cooley v. Moss*, 123 Ga. 710 (51 S. E. 625), *Glessner v. Longley*, 125 Ga. 676 (54 S. E. 753), *Oliver v. Reeder*, 7 Ga. App. 276 (66 S. E. 955), and other authorities setting forth the same principle, are cited. That this principle is well settled can not be controverted. However, the real question in this case is, whether the mere fact that the character and quantity of service to be rendered by Benton was discretionary with him raises such an implication that no services whatever would be performed as would deprive the contract of mutuality and render the agreement void.

To our minds the fact that the agent's duty was defined to be that of examining and checking the books, papers, and business of the bank at such times as he might see proper, and to do and perform other acts (or not do and perform them) as he might deem

necessary or expedient for the successful operation of the bank, does not necessarily relieve him from the necessity of performing duties which the law would assume to be of value. Though the occasions when service was to be rendered, and the nature of such service, were left discretionary with the agent, it is not to be implied from that fact that the contract was nudum pactum. The fact that he was clothed with a discretion involved the duty of exercising that discretion for his principal's best interest. It is rather to be inferred that the bank relied upon the plaintiff's skill and expertness, and financial connections, to determine what was necessary to be done; and if at a particular time it was not necessary that anything should be done, then, at the option of the agent, a policy of inaction was to be pursued as most profitable. The agreement under consideration is not unlike a contract for the employment of a physician or attorney at law to do whatever may be deemed necessary for the patient or client, as the case might be, during a specified time. In such a case there is, of course, a reservation that if it should be best that nothing be done for the patient or client (as the case might be), the very determination of that fact would be such an element of value as would supply consideration to the contract. If I employed a physician by the year it would not be essential to his compliance with the contract that he should compel me to take medicine when it was not necessary, but it would be his express duty to direct me to abstain from medical treatment if, in his professional judgment, medicine was unnecessary.

So much as to that portion of the contract which appears to leave the time and manner of performance of Benton's duty, as financial agent, discretionary with himself. However, in any event, the court properly overruled the demurrer, for the reason that one duty was unequivocally assumed by the plaintiff (though, considering the contract as a whole, even its positive statement would have been qualified by an element of discretion lodged in the financial agent). That duty was the making of financial connections and securing correspondents for the bank. And this phrase, not being qualified with any such expression as "when he may see proper," or "as he may deem expedient," would have prevented the contract from being unilateral.

We do not place our ruling, however, on this portion of the contract alone, because, while it is in the power of the defendant to

show any neglect of Benton's duty due to a failure to exercise his discretion properly, where he was charged with discretion, nevertheless it is undoubtedly true that where one agrees to exercise his skill as an expert in determining whether anything should be done, and, if so, what, or to decide that nothing is necessary to be done, as the case may be, the contract is just as valid as if the duties to be performed are minutely specified. The courts have recognized the validity of contracts by which one agrees to exercise his inventive ability for another, and yet the inventor can not agree to produce any definite results. *Emerson v. Pacific Coast Packing Co.*, 96 Minn. 1 (104 N. W. 573, 1 L. R. A. (N. S.) 448); *Connelly Mfg. Co. v. Wattles*, 49 N. J. 92 (23 Atl. 123). See, also, 20 Am. & Eng. Enc. L. (2d ed.) 49; 26 Cyc. 1021.

2. In any contest over the performance or non-performance of such a contract, of course, the legal maxim, "id certum est quod certum reddi potest," would control.

So far as the objection urged by the demurrer that Benton did not tender to perform any service after March 31, 1908, is concerned, it is stated in the petition that the bank, without Benton's consent or approval, went out of business before that time, and, the bank itself having rendered performance on Benton's part impossible, the tender of an impossibility would have been nugatory, and is not required. There was no error in overruling the demurrer.

Judgment affirmed.

3450. ATLANTIC COAST LINE RAILROAD COMPANY *v.*
GORDON & COMPANY.

1. Under the Civil Code (1910), § 4126, providing that, on cash sale of cotton and certain other agricultural products, title does not pass by delivery, until the cash is in fact paid, a sale so intended by the parties is no less a cash sale because actual payment of the cash is not made concurrently with delivery, but is temporarily deferred to meet the convenience of the parties in making a settlement.
2. While it is true that if a concealed principal sues upon a contract made by his agent in the latter's name, the defendant may set off any counter-claim he has against the agent with whom he contracted, as if he were the principal, whether the counter-claim grows out of the contract in question or not, still this doctrine does not apply where the person contracted with by the agent becomes the moving party and attempts

to hold the concealed principal, and it appears that he who is thus moving did nothing and gave up nothing on faith of the agent's apparent principalship.

3. One who has the right of possession of personal property which is converted by a stranger or a mere wrong-doer may sue in trover and recover the full value of the property, though his right of possession be held under a qualified title and only for some special purpose, such as security for a debt; still the plaintiff's recovery in such a case is held for the benefit of himself and for all others in community of title or possession with him, as their respective interests may appear. Whenever a plaintiff who, though having a right of possession, has it only for the special purpose of securing a debt brings trover against the person for whose benefit he would, if he recovered the full value of the property, hold the overplus beyond his debt, the court, on the trial of the trover case, will adjust the matter by limiting the amount of his recovery to the amount of the debt.

DECIDED JANUARY 15, 1912.

Trover; from city court of Savannah—Judge Davis Freeman.
March 27, 1911.

P. W. Meldrim, Shelby Myrick, for plaintiff in error.

W. W. Gordon Jr., E. S. Elliott, contra.

POWELL, J. This case has been before this court previously. See 7 Ga. App. 354 (66 S. E. 988). The only point there involved (as to whether nonsuit was proper because the plaintiff had not shown the value of the property in dispute) cuts no figure in the present record. The case is in trover. The plaintiffs, Gordon & Company, are cotton factors at Savannah. Giddens was a customer of theirs at Kirkland, Georgia. On January 18, 1908, they had certain cotton of Giddens's on which they had made advances to an amount probably exceeding the value of the cotton. On that date, Giddens himself being absent from his place of business, a brother of his was in charge. A man named Stone brought in a bale of cotton which the brother bought from him for Giddens, telling Stone that Giddens would hand him the money for it on his return to the store on the next day. This brother caused the cotton to be placed in the custody of the defendant, the Atlantic Coast Line Railroad Company, and obtained a bill of lading for it in the name of Gordon & Company, as consignees. When Giddens returned to the store and Stone requested his money, Giddens refused to pay the price his brother had named, and he and Stone rescinded the trade and so notified the agent of the railroad company, who, at their instance, issued another bill of lading, in favor of Stone as consignor, and of Butler, Stevens & Company, of Savan-

nah, as consignees. In due time the railroad company delivered the cotton, on this last bill of lading, to Butler, Stevens & Company. On January 18, Giddens (or his brother writing in his name) sent to Gordon & Company the bill of lading first issued for the cotton, writing to them, "Please handle to best advantage; please pay draft made to James Summerlin for \$55.05." Gordon & Company refused, however, to pay the draft mentioned, because Giddens's account was already overdrawn. There was also a contention by the plaintiffs that Stone had authorized Giddens to ship the cotton to Gordon & Company for him, he (Stone) being a concealed principal. Whether there is any legal evidence to support this contention we need not determine, in the light of what we shall decide as to the point. The value of the cotton, as found by the jury, was \$47.19. The total amount due Gordon & Company by Giddens, and upon which they based their right to have the cotton, was about \$35. The plaintiffs' case was based on the theory that they had the right to the possession of the cotton by reason of the issuance of the bill of lading, and that the railroad company's action in shipping it and delivering it to Butler, Stevens & Company was a conversion. Under an instruction from the court that if the jury found the issues in favor of the plaintiffs, they should find for them the full value of the cotton as damages, the jury rendered a verdict in favor of the plaintiffs, for \$47.19.

1. If Stone was the true owner of the cotton and made a cash sale of it to Giddens or his brother, and the cash was not paid him, no title passed out of him to Giddens, and none from Giddens to the plaintiffs; and in that event the plaintiffs could not recover. In this State the title to cotton and certain other agricultural products sold on cash sale does not pass by delivery, until the cash is in fact paid. Civil Code (1910), § 4126. The fact that Stone agreed to await the return of Giddens on the next day after he delivered the cotton to Giddens's brother before receiving the cash in hand did not make it a credit sale, if a cash sale was intended. *McCall v. Hunter*, 8 Ga. App. 612 (70 S. E. 59); *Flannery v. Harley*, 117 Ga. 483 (43 S. E. 765).

2. The plaintiffs claim that there was evidence that Giddens, in shipping the cotton to Gordon & Company, was acting for Stone as concealed principal, and relies upon the doctrine that if the concealed principal sues on a contract made by his agent, the defendant

may set off any counter-claim he has against the agent with whom he contracted as principal, whether the counter-claim grew out of the contract in question or not (as to which, see *Durant L. Co. v. Sinclair L. Co.*, 2 Ga. App. 209 (4), 58 S. E. 485, and citations). This principle would plainly have been applicable if Giddens were acting as agent for Stone as concealed principal and Gordon & Company had honored the draft, or if Stone, or any one holding under him, were attempting to hold Gordon & Company in any wise liable for the price of the cotton, but we do not think that it is applicable here, where Gordon & Company did nothing and gave up nothing on the faith of Giddens's ownership of the cotton. The reason of the rule does not extend to such cases; and the rule should not. Be that as it may, the only proof, so far as we see, of the existence of any such relationship between Stone and Giddens is found by implication from a declaration contained in one of Giddens's subsequent letters to Gordon & Company. As between the parties to this suit the admissions and declarations of Giddens as to such matters were mere hearsay and of no probative value.

3. But after all, there is one absolute and controlling reason why the verdict can not stand. Take the claims of Gordon & Company at their highest, their only right to this cotton is to hold it for the protection of their factor's lien, for some \$35. If we could concede their lien and their right to the possession of the cotton as security therefor, still it must be remembered that they are not suing a stranger to the title. The railroad company, in committing the alleged conversion, was acting on behalf of the person holding the general title to the property, and, for the purposes of this suit, stands (to speak metaphorically) in that person's shoes. It is undoubtedly true that one having a right of possession may sue a stranger or mere wrong-doer in trover, and recover the full value of the property, though his right of possession rests on only a qualified title. In such case the money recovered is held by the plaintiff for the benefit of himself and all others in community of possession or title with him, as their respective interests may appear. Compare *Kaufman v. Seaboard Air-Line Railway*, ante, 248 (73 S. E. 592). If the defendant in the trover suit has an interest in the property, so that in the event of a recovery the plaintiff would, under the rule just mentioned, hold any money recovered wholly or partly for his (the defendant's) benefit, the rights of the

respective parties may be adjusted in the trover suit, where the plaintiff elects to take a money verdict; and if the plaintiff, though having a right of possession, is entitled to hold that possession only as security for a debt, and the defendant is the one to whom the property would go after the debt is paid, the plaintiff in the trover suit can in no event recover a money judgment for more than the amount of his debt. In such cases, if the rule were otherwise, a multiplicity of suits would arise. For instance, we will say that A. has pledged an article worth \$40 to B. in pawn, for a debt of \$10, and illegally takes it out of B.'s possession. B. sues him in trover. If he were to recover \$40, the full value of the article, he would at once hold \$30 for A.'s use and benefit, as to which A. might, upon demand, maintain an action for money had and received. Therefore, the rule is that in all such cases the plaintiff's money verdict will be so limited as to represent his ultimate rights.

A fair application of this rule is found in those cases where property is sold on conditional sale, and, upon default on the purchaser's part, the seller brings trover. In such cases it has been uniformly held that the plaintiff's recovery can never exceed the amount of his debt. See *Elder v. Woodruff Hdw. Co.*, 9 Ga. App. 484 (71 S. E. 806), and cit. Whenever, in a trover case, the proof shows that the interest of the plaintiff is less than absolute ownership, and the defendant is the owner of the general property, the measure of damages will be the value of the plaintiff's interest therein, whatever that may be. *Holmes v. Langston*, 110 Ga. 861, 867 (36 S. E. 251), (a case between pledgor and pledgee). "A creditor's recovery from his debtor in an action of trover for converting collaterals can not exceed the amount of the debt with legal interest." *Bell v. Ober*, 96 Ga. 214 (23 S. E. 7). See, generally, on the subject, *Hays v. Jordan*, 85 Ga. 741 (11 S. E. 833, 9 L. R. A. 373). In the case at bar, if the railroad company committed any conversion as against the plaintiffs, it did so under instructions from both Giddens and Stone, and, thus having become their agents in the matter, is entitled to justify and defend under whatever rights they would have been entitled to set up if the plaintiffs' action were proceeding against them or either of them, instead of proceeding as it does against the carrier. Therefore, in no event should the plaintiffs' recovery exceed the amount of their debt.

Judgment reversed.

3451. WILKINS v. BARNES.

HILL, C. J. This case is controlled by the repeated rulings of this court and of the Supreme Court, following section 5585 of the Civil Code of 1895 (section 6204 of the Civil Code of 1910), that unless the verdict was demanded by the law and the evidence, the first grant of a new trial will not be disturbed. *Holland v. Williams*, 3 Ga. App. 636 (60 S. E. 331), and cases there cited; *Smith v. Maddox-Rucker Banking Co.*, 135 Ga. 151 (68 S. E. 1031). *Judgment affirmed.*

DECIDED JANUARY 15, 1912.

Appeal; from Walton superior court—Judge Brand. April 29, 1911.

W. O. Dean, for plaintiff in error. *O. Roberts*, contra.

3452. FREEMAN v. MAXWELL FURNITURE CO.

The discretion of the judge of the superior court in the first grant of a new trial upon certiorari will not be controlled, unless it is manifest that there was an abuse of discretion.

DECIDED JANUARY 15, 1912.

Certiorari; from Richmond superior court—Judge H. C. Hammond. March 15, 1911.

I. S. Peebles Jr., *T. F. Harrison*, for plaintiff in error.

B. B. McCowen, contra.

RUSSELL, J. Upon the hearing the judge of the superior court entered a judgment sustaining the certiorari, with cost against the defendant in certiorari. No final direction was given to the case, and, though the judge of the superior court, in his discretion, might have instructed the lower court upon the principles which should govern another trial, this duty was not mandatory. The sustaining of a certiorari, without the entry of a final disposition of the case, has the same effect as the granting of a new trial upon motion therefor.

There were several errors in the trial in the justice's court, any one of which would have authorized the judge to sustain the certiorari. Nothing is better settled than the principle announced in *Fair v. Metropolitan Life Insurance Co.*, 2 Ga. App. 376 (58 S. E. 498): "Unless the judgment rendered is absolutely demanded by the evidence, the first grant of a new trial on certiorari will not be interfered with." The case at bar seems to be controlled by the

ruling in *Rhodes Furniture Co. v. Jenkins*, 2 Ga. App. 475 (58 S. E. 897), but from the testimony in the record there is some question as to which party rescinded the contract. Another trial may more satisfactorily resolve this doubt in favor of one party or the other.

Judgment affirmed.

3461. *MANBECK v. HOLTZENDORF.*

HILL, C. J. On the trial of the claim case in the justice's court the evidence demanded the verdict in favor of the claimant as rendered, and there was no error by the judge of the superior court in overruling the certiorari.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Certiorari; from Ben Hill superior court—Judge Whipple.
April 14, 1911.

L. Kennedy, for plaintiff. *Clayton Jay*, contra.

3463. *ILLINOIS CENTRAL RAILROAD CO. v. DOUGHTY.*

Under the Mississippi statute (Code of Mississippi (1906), § 4851), which provides, "Every bill of lading or other instrument in the nature or stead thereof, acknowledging receipt of property for transportation, shall be conclusive evidence in the hands of a bona fide holder for value, whether by assignment, pledge, or otherwise, as against the person or corporation issuing the same, that the property has been so received," where a transportation company has issued a bill of lading for so many bales of cotton, weighing so many pounds, and describes it as being marked with certain letters of the alphabet, and the company tenders to a bona fide holder of the bill of lading the specified number of bales, which in fact weigh less than the weight stated, and are marked with different letters, and the holder of the bill of lading accepts the cotton, but stipulates that he does not accept it in satisfaction of the bill of lading, and sues the carrier, and it appears that the marks on the cotton were immaterial in fixing its value, *held*, that the carrier may show that the cotton tendered by it was the identical cotton received by it, despite the discrepancy in marks; but it is liable for the shortage in weight.

DECIDED JANUARY 15, 1912.

Attachment; from city court of Richmond—Judge W. F. Eve.
May 8, 1911.

Joseph B. & Bryan Cumming, for plaintiff in error.

C. H. & R. S. Cohen, contra.

POWELL, J. A dealer in cotton at Grenada, Mississippi, caused a compress company to deliver on his behalf to the Illinois Central Railroad Company a lot of cotton for shipment to Savannah, Georgia, and received therefor a bill of lading describing it as 100 bales of cotton weighing 51,990 pounds, marked "Payk." This bill of lading was transferred to the plaintiff, Doughty, who took it as a bona fide holder for value. He demanded the 100 bales of cotton of this weight and marking. The delivering company at Savannah (the Illinois Central Company having undertaken to deliver it through connecting carriers) was unable to find any such cotton, but tendered 100 bales marked "Park," and of some 200 pounds less weight. Under an agreement between the plaintiff and the railroad company, he accepted this cotton "without prejudice," and sold it for the benefit of whom it might concern. He showed that he had bought the cotton as being of a certain grade, though he had no information as to the grade except what the seller represented, and the seller, it appeared, had not actually graded the cotton before shipment. The railroad company undertook to show that the cotton which was delivered to it was marked "Park" and not "Payk," and that the cotton which it received was the identical cotton which it tendered in delivery; indeed, contended that the letters designated as "Payk" in the bill of lading were not the letters "Payk," but were the letters "Park," and that what the plaintiff claimed to be a "y" was in fact an "r"; but as the judge who tried the case without the intervention of a jury found that the bill of lading contained the "y," that finding is binding on this court. The showing under the defendant's proof, which was first tentatively admitted and then ruled out, was very conclusive that it tendered in delivery the same cotton which it had received. The court ruled out this evidence, on the ground that its admission was forbidden by a statute of the State of Mississippi, where the shipment was made, which is contained in the Mississippi Code, § 4851, as follows: "Every bill of lading or other instrument in the nature or stead thereof, acknowledging receipt of property for transportation, shall be conclusive evidence in the hands of a bona fide holder for value, whether by assignment, pledge, or otherwise, as against the person or corporation issuing the same, that the property has been so received." It was conceded that the marking of the cotton was immaterial except for purposes of identification; that it

neither added to nor detracted from its value in any sense; that it designated neither weight nor grade.

We think that the court erred in ruling out the testimony offered by the defendant. The bill of lading was conclusive upon the company both as to the number of bales and as to the weight, and, so far as these things tended to fix value, bound the company to deliver to the bona fide holder of the bill of lading cotton of that value. The proof which was offered was, therefore, not admissible for the purpose of contradicting the bill of lading in these respects, but was admissible to show the other element, that the cotton which the plaintiff shipped was not of the grade he represented it to be; and this was a material element in fixing the liability of the carrier. The bill of lading made no representation as to the grade of the cotton, and it was essential as a part of the plaintiff's case for him to prove what the grade was. The mere fact that the person who sold to him represented that it was of a certain grade would not supply that element of the case. And even if there had been testimony from him that the cotton which he delivered was in fact of a certain grade, it would, nevertheless, have been permissible for the company to show that it delivered this identical cotton, and that it did not come up to the grade which the plaintiff's testimony had tended to establish. The rejected testimony should have been admitted; and, under the law as applied to this bill of lading, the carrier should have been held liable for the deficiency in weight, but not liable for the deficiency in grade. We think this is in harmony with the decisions of the Supreme Court of Mississippi, construing the statute of that State. See *Yazoo Ry. Co. v. Bent*, 94 Miss. 681 (29 L. R. A. (N. S.) 821, 47 So. 805); *Lloyd v. Kansas City R. Co.*, 88 Miss. 422 (40 So. 1005); *Ill. Cen. R. Co. v. Lancashire*, 79 Miss. 114 (30 So. 43); *Hazard v. Ill. C. R. Co.*, 67 Miss. 32 (7 So. 280).

Judgment reversed.

3465. HICKMAN v. BELL.

POWELL, J. 1. The defendant, being sued on a note, filed two pleas: (1) non est factum; (2) what was called a plea of estoppel by conduct misleading the defendant into a belief that the debt had been paid. The evidence established no legal defense under the second plea. Held, that the court did not err in restricting the jury to a consideration of the de-

- fense made by the other plea, as to which there was a conflict in the evidence. *Kelly v. Strouse*, 116 Ga. 872 (2a), (43 S. E. 280); *Crew v. Hutcheson*, 115 Ga. 511 (2), (42 S. E. 16).
2. In the absence of written request, it is not reversible error for the court to omit to instruct the jury as to the burden of proof in a civil case. *Central Ry. Co. v. Manchester Mfg. Co.*, 6 Ga. App. 254 (2), 257 (64 S. E. 1128).
3. Where an issue of forgery is before the jury for trial, and papers containing the signature of the alleged signer of the instrument in question are offered in evidence, a general objection of irrelevancy does not present the specific point that the genuineness of the signatures on the papers offered for comparison has not been shown. *Judgment affirmed.*

DECIDED JANUARY 15, 1912.

Complaint; from city court of Waynesboro—Judge Davis. April 24, 1911.

H. J. Fullbright, for plaintiff in error.

E. L. Brinson, A. P. Bell, contra.

3466. BANK OF SOUTHWESTERN GEORGIA v. EMPIRE LIFE INSURANCE COMPANY.

The proper practice in a claim case, where the claimant fails to put in an appearance, is either to dismiss the claim, or to have the plaintiff make out his case and take a verdict finding the property subject to the execution; and where the entry of levy on the execution recites that at the time of the levy the property levied upon was in the possession of the defendant in execution, this would make out a *prima facie* case in behalf of the plaintiff in *fi. fa.*, and would cast the burden upon the claimant, and, in the absence of the claimant, would entitle the plaintiff in *fi. fa.* to a verdict finding the property levied upon subject.

DECIDED JANUARY 15, 1912.

Levy and claim; from city court of Leesburg—Charles H. Beazley, judge pro hac vice. April 21, 1911.

W. A. Dodson, for plaintiff in error.

Tipton & Passmore, contra.

HILL, C. J. This was a claim case, and the only issue raised for the decision of this court is whether the trial judge erred in allowing the plaintiff in *fi. fa.* to join issue and take a verdict finding the property levied upon subject, where there was no appearance for the claimant. The plaintiff in error insists that the claim should have been dismissed. In *National Furniture Co. v. Edwards*, 105 Ga. 240 (31 S. E. 161), it is held that "the proper practice in a

claim case, where the claimant fails to put in an appearance, would be either to dismiss the claim, or for the plaintiff to make out his case before he would be entitled to a verdict or judgment subjecting the property." Under this decision, when the case was called for trial and the claimant was absent and unrepresented, the trial judge could either have granted a motion to dismiss the claim, or have allowed the plaintiff to make out his case and take a verdict finding the property subject; and, at the instance of the plaintiff in the court below, the latter course was adopted. Did the plaintiff make out his case? It does not appear that he introduced any evidence. The recital in the bill of exceptions is that he tendered issue, impaneled a jury, and proceeded to take a verdict finding the property subject. The execution, with the entry of the levy, was a part of the papers before the court even if not formally introduced in evidence, and the entry of the levy made by the sheriff on the execution, recited that at the time of the levy, the property levied upon was in the possession of the defendant in execution. This was sufficient to make out a prima facie case and to cast the burden upon the claimant. Where the claimant was not present to carry this burden, it seems that the plaintiff was entitled to a verdict finding the property subject to the execution. Civil Code (1910), § 5170. There was no error.

Judgment affirmed.

3474. DRAPER & Co. v. BURR MANUFACTURING CO.

HILL, C. J. This was a suit in a justice's court, upon an open account verified by the affidavit of the plaintiff. When called for trial, no counter-affidavit was filed, and the case was in default, and judgment was rendered for the plaintiff. Subsequently the defendant appeared and filed a plea, and entered an appeal from the judgment to a jury in the justice's court. When the appeal was reached for trial the justice struck the plea because filed too late, and dismissed the appeal. On certiorari the justice was sustained. *Held*, no error. Civil Code (1910), § 4730; *Odell v. Meacham*, 114 Ga. 910; *Rockmore v. Cullen*, 94 Ga. 648.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Certiorari; from Decatur superior court—Judge Frank Park. May 14, 1911.

John R. Wilson, for plaintiffs in error.

Russell & Custer, W. O. Fleming, contra.

3476. WASHINGTON COUNTY v. HOLLIMAN.

Where this court, upon exception to nonsuit, passes on the legal sufficiency of the evidence, and it is held sufficient to support a verdict in the plaintiff's favor, and upon a retrial of the case on substantially the same evidence a verdict for the plaintiff is rendered, and the case is brought to this court again, with no new question presented, but on the sole assignment of error that the verdict is without evidence to support it, it is the duty of this court to affirm the judgment with damages.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Sandersville—Judge Jordan. April 5, 1911.

T. W. Evans, Hardwick & Wright, for plaintiff in error.

Evans & Evans, contra.

POWELL, J. When this case was here before (8 Ga. App. 718 70 S. E. 100), on exception to nonsuit, we held that whether the defendant was guilty of negligence and whether the plaintiff was guilty of contributory negligence were jury questions, under the evidence as then presented. The evidence in the present record is substantially the same, though, perhaps, a little stronger in the plaintiff's favor. The retrial of the case resulted in a verdict for the plaintiff. The only exception is that the verdict is contrary to the evidence. Even if it were likely that this court would change its views so soon on the questions presented alike by the former and the present records, it has not the right or legal power to do so, so far as affects this case. The plaintiff in error certainly could not have hoped for any benefit, other than delay, from bringing the case to this court. As we can not escape the conclusion that the case is brought for delay only, it is our duty to award damages.

Judgment affirmed, with damages.

3479. CHARLESTON & WESTERN CAROLINA RAILWAY
CO. v. ANCHORS.

1. Before the act of Congress of April 22, 1908 (35 Stat. 65, c. 149, U. S. Comp. St. Supp. 1909, p. 1171), known as the Federal "employer's liability act," applies to an action for damages brought against a railroad company by one of its employees for injuries received in the service of the company, it must appear, (1) that the railroad company is an interstate carrier; (2) that, as to the transaction through which

the injury occurred, it was at the time engaged in interstate commerce; and (3) that the injured employee was at the time engaged in interstate commerce.

2. Where the foreman of a gang of railroad track hands is injured by being struck in the eye by a particle of iron put in flight by a negligent stroke of a hammer in the hands of one of the men working under him, and it appears that the business on hand at the time of the injury was the taking up and relaying of one of the rails of the track, it is held that the parties were not engaged in interstate commerce, notwithstanding that the track in question may have been devoted to the passage of interstate, as well as intrastate, trains, and notwithstanding that the railroad, in a general sense, may have been an interstate carrier. To such a transaction the Federal statute does not apply.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Richmond county—Judge W. F. Eve. May 24, 1911.

Anchors sued the Charleston & Western Carolina Railway Company for the loss of an eye, resulting from alleged acts of negligence as set out in the petition. The case came to this court on exceptions to the overruling of a demurrer to the petition.

The plaintiff was employed by the defendant as foreman of a gang of track hands, working on the track of said road near McCormick, S. C., over which the defendant operated trains back and forth between Georgia and South Carolina. One of the track hands working under him struck the blow from which the injury to his eye resulted. Paragraph 2 of the petition reads as follows: "Said defendant is a common carrier, owning a line of railroad between the city of Augusta in the State of Georgia, and the city of Spartanburg in the State of South Carolina, and, on the date of the injury herein complained of, was engaging in commerce between the State of Georgia and the State of South Carolina and between the several States, and the injury hereinafter complained of was sustained by plaintiff while he was employed by said defendant carrier in said interstate commerce, and defendant is liable in damages therefor under the act of Congress of April 22, 1908, which declares that such an employee may recover from such a common carrier, for 'injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.'" It is further stated that the work in which the plaintiff and the other servant of the

company were engaged was the taking up and replacing of one of the rails of the track, and that the work was being rushed, so that an interstate train could pass on schedule. The demurrer was upon various grounds, the chief ground insisted upon being that the petition set out no cause of action under the said act of Congress of 1908, because the plaintiff, being a track hand engaged in repairing a track in South Carolina at the time of the injury, was not employed in interstate commerce within the meaning of that act; and that the defendant, as to the transaction in question, was not so engaged. The demurrer was overruled upon all the grounds.

William K. Miller, for plaintiff in error. .

William H. Fleming, contra.

POWELL, J. (After stating the foregoing facts.)

The sole question involved is whether the act of Congress of April 22, 1908, known as the Federal "employer's liability act," applies to this transaction. That statute, by its terms, relates only to liability of carriers by railroad "while engaged in commerce between any of the several States" to persons "while employed by such carrier in such commerce." It will be called to mind that the prior act of Congress on the same subject (the act of 1906) was declared unconstitutional by the Supreme Court of the United States in *Howard v. Illinois Central R. Co.*, 207 U. S. 463 (52 L. ed. 297), on the ground that it applied to all carriers who were generally engaged in interstate commerce, as to all employees, whether the carrier and the employee were at the time of the injury actually engaged with commerce of that character or not. The present law was enacted with its limitations with the special object in view of cutting out the constitutional objection for which the prior law had been declared invalid. The present law emphasizes three things which must concur before its provisions are applicable: (1) the railroad company in question must engage in interstate commerce; (2) it must at the time of the injury in question be engaging in that character of commerce, as contradistinguished from such purely local matters as it may also engage in; (3) the injured servant must also at the time of receiving his injury be engaging in interstate commerce. That the carrier in this case was generally engaged in interstate commerce is not in question. The remaining questions are whether, at the time the injury complained of was

received, it was engaging in interstate commerce, and whether the injured employee was engaging in that character of commerce at that time. To narrow the point a little more, the concrete question is whether the work of repairing a defective rail in a track over which a railroad company carries on its transportation, both local and interstate, is of itself an act of engaging in interstate commerce.

It is very difficult to impose the limitations of a definition upon the word "commerce" as used in the Federal constitution. How this term, which originally was considered as almost synonymous in meaning with the word "trade," has been enlarged so as to include contracts, transportation, ways, means, and agencies, and even instrumentalities by which commercial intercommunications are carried on, is a matter of legal history. Still, with all of its enlargement of meaning, the word "commerce" has its limitations, and there are some things which, though touching the field of commercial operation, do not enter into it in such a way as to become of themselves a part of the commerce. The insuring of articles intended for interstate transportation is a matter which touches interstate commerce, but is not commerce within the purview of the constitution. *Paul v. Virginia*, 75 U. S. (8 Wall.) 168 (19 L. ed. 973); *Hooper v. California*, 155 U. S. 49 (39 L. ed. 297); *Nutting v. Moss*, 183 U. S. 553 (46 L. ed. 634). To manufacture goods with the intention of devoting them to interstate commerce is not interstate commerce. *U. S. v. Knight Co.*, 156 U. S. 1 (39 L. ed. 325). In the case of *Kidd v. Pearson*, 128 U. S. 1 (32 L. ed. 346), in which it is held that a State may prohibit the manufacture of intoxicating liquors within its borders, notwithstanding that the manufacturer intends to use the liquors only for exportation beyond the borders of the State, the court, speaking through Mr. Justice Lamar, draws the distinction between manufacture and commerce thus: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The

legal definition of the term as given by this court in *County of Mobile v. Kimball*, 102 U. S. 691, 702 [26 L. ed. 238, 241], is as follows: 'Commerce with foreign Nations and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the State, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management." Again, in *Coe v. Errol*, 116 U. S. 517 (29 L. ed. 715), the court held that logs cut in the woods and brought to the landing for the purpose of being transported in interstate commerce did not thereby become a subject of interstate commerce.

From these and other cases of the Supreme Court of the United States along the same line, it is clear that a distinction is observed between preparing to engage in interstate commerce and in engaging in interstate commerce. As was pointed out by the United States Supreme Court in *Smith v. Alabama*, 124 U. S. 465, 481 (31 L. ed. 508), "it is to be remembered that railroads are not natural highways of trade and commerce; they are artificial creations; they are constructed within the territorial limits of the State and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State." And, as the opinion of the court in that case goes on to point out, there are many matters relating to the preparation of a

railroad company to engage in interstate commerce which are of a purely local nature, and are not of themselves a part of interstate commerce. From the reasoning and from the illustrations given in the case of *Howard v. Illinois Central R. Co.*, *supra*, in which the former "employer's liability act" was declared unconstitutional, it is plain that the court had in mind that there were necessarily a number of activities which an interstate railroad might engage in which would not constitute engaging in interstate commerce. It is true that, in a more or less remote sense, every act performed by an employee for a carrier that engages indiscriminately in local and interstate commerce tends to promote the latter form of commerce. The porter who cleans the cuspidors in the general offices of the company, for the comfort and convenience of the officers who direct the movement of the trains as they pass from State to State and the other great commercial activities of the carrier, is, in a certain sense, engaged in carrying on that great commerce, but we do not believe that this menial employee, in his strictly local duties, is within the purview of the act of Congress in question; and we believe that the connection between the services to be performed and the commerce itself must be closer than that.

Just here let us make this point clearer: that wherever this Federal statute applies, all State laws give way and employer and employee alike are bound by its terms. Considering it in its operation throughout the entire United States and noticing its effect upon the local jurisprudence of the various States, it may be seen that in some States, as to some transactions, and as to some phases of what is commonly known as the master and servant law, it gives the employee a benefit, while in other States, or as to other transactions, or as to other phases of the master and servant law, it gives the employer the benefit. Whatever it takes from one side it gives to the other, and vice versa. For instance, in the State of South Carolina, where this very injury arose, the Federal act is more beneficial to the employee in this particular instance than the State law is, because the defense of fellow service is, by the Federal act, abolished as to the under-servant who inflicted this injury upon his foreman, whereas, under the South Carolina statute, the railroad company could have pleaded the doctrine of fellow servant, to exempt itself in such a case. And yet in most respects the South Carolina statute on this general subject is more favorable to the

servant than it is to the master. So when the court proceeds to lay down the rule that this or that service performed by an employee for a railroad company constitutes engaging in interstate commerce, no person can thereafter enter into the service of an interstate carrier and perform that service for it without surrendering whatever particular benefits may be given him by the State law, so far as they are not also given by the Federal law. We mention this in response to the argument presented by able counsel for the defendant in error, that this Federal statute is one of those beneficent and progressive acts of legislation which should be given the widest possible legal scope, and that the benefit of every reasonable doubt should be given in favor of maintaining jurisdiction under it. Personally, we give accord to the sentiment that the Federal act is, in most respects, a wise and beneficent piece of legislation, and a fair and just statute; but that is a matter with which we have no concern at all. All valid statutes enacted by Congress within the scope of its powers are, so far as we as judges are concerned, wise and beneficent and just acts of legislation. On the other hand, every valid State statute is to be considered to be entitled to the same respect and judicial approval, so far as it is enacted within the scope of the State's powers.

After carefully considering the question, and with no other end in view than to give to the act of Congress just such scope as it is legally entitled to, without any prejudice for or against the legislation as such, we can not see how the act of repairing a broken rail in a railroad track is engaging in commerce at all, nor how the repairing of a part of the physical properties of a railroad, which are in their very nature permanently fixed within the limits of the State, can be regarded as an interstate transaction at all. To our minds neither the servant who struck the blow nor the servant whose eye was injured through the blow's being struck was engaged in interstate commerce, since the whole object of striking the blow was merely to drive a spike to hold in place a rail, that this defendant might have a railroad track upon which it could thereafter, if it so desired, engage in commerce, either interstate or intrastate. If the distinction between preparing to engage in commerce and the act of actually engaging in it is to be observed, this transaction falls squarely within the domain of preparation.

We are aware that the courts, so far as they have passed upon

this and cognate questions, have been widely divided in opinion. To support the view that the Federal statute would apply in such cases, see *Zikos v. Oregon R. & N. Co.*, (C. C.) 179 Fed. 893; *Colasurdo v. Ry. Co.*, (C. C.) 180 Fed. 832 (recently affirmed by the Court of Appeals of the second circuit, 191 Fed.). On the contrary, see *Taylor v. Sou. Ry. Co.* (by Judge Newman of the United States court of the northern district of Georgia), 178 Fed. 380. Indeed, the conflict in judicial views on the question is such that notwithstanding what decisions may be rendered in the meantime, the question can be treated as an open one until the Supreme Court of the United States itself decides it, as it probably will do at some early date. In the meantime the judgment is *Reversed.*

3480. CHARLESTON & WESTERN CAROLINA RAILWAY
CO. *v.* FINLEY.

1. The petition set out a cause of action, both in form and in substance, and the demurrer, general and special, was properly overruled.
2. In cases where two or more acts of negligence, or other wrongs, are set forth, either one of which alone, or in connection with others alleged, caused or contributed to the injury for which suit is brought, the plaintiff is not required to elect upon which alleged act of negligence or wrong he will go to trial, but he can recover such damages as he has sustained, whether the damages arise from one or from all of the acts of negligence or wrongs alleged, provided the evidence shows that the injury was proximately caused by some one of the acts of negligence or other wrongs; that is, the plaintiff is entitled to recover damages either for negligence or for wilful misconduct as alleged on the part of the defendant, according to the proof.
3. Excerpts from the charge, in effect embodying the foregoing principle of law, were not erroneous.
4. A new trial will not be granted for newly discovered testimony merely cumulative and impeaching in character, and which probably would not produce a different result.
5. The record discloses no material error, and the verdict is supported by some evidence.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Richmond county—Judge W. F. Eve. May 18, 1911.

William K. Miller, for plaintiff in error.

Isaac S. Peebles Jr., Sidney Smith, contra.

HILL, C. J. W. F. Finley, employed by the Charleston & West-

ern Carolina Railway Company as a freight-train hand running from McCormick to Anderson, South Carolina, sued for damages for personal injuries received June 14, 1907, at Hesters, South Carolina. A verdict was returned in his favor, for \$1,500, and the company's motion for a new trial was overruled. The petition alleged, in substance, that the injuries were received in the following manner: The freight-train stopped at a station called Hesters, for the purpose of unloading freight, a part of which consisted of a barrel of kerosene oil weighing about 600 pounds. The conductor of the train entered the freight-car which contained the barrel of oil, at a point opposite to where the freight was usually unloaded, and rolled this barrel to an open door of the car and ordered the plaintiff, who was standing on the ground at the door of the car, to take hold of the barrel and place it upon the ground. On giving this order the conductor pushed the barrel of oil half clear of the threshold of the car door, so that one end of the barrel was held by the plaintiff and the other was resting on the door-sill of the car. While the barrel was in this position, the plaintiff objected to the order of the conductor, and complained that the barrel was too heavy, and that he could not lift and handle it alone. Thereupon the conductor, repeating his order with an oath, without warning pushed the barrel of oil clear of the side of the car upon the plaintiff. He attempted to get from under the barrel, but its weight was on him before he was aware of the intention of the conductor to push the barrel out upon him. The barrel falling upon him caused the injury for which he seeks to recover damages, and he alleges that the proximate cause of this injury was the negligent act of the conductor in pushing the barrel of oil upon him without giving him time to get from under the same, and without warning him of his intention. He alleges also that this act of the conductor in pushing the barrel of oil upon him, without giving him warning of his intention so that the plaintiff could escape the consequences of the conductor's act, was wanton conduct, for which the company is liable in punitive damages. He alleges further that the defendant company was negligent in failing to furnish a sufficient number of hands to handle the freight, the regular complement of a freight-train consisting of four brakemen or train hands, and there being at that time only two employed by the company. And he alleges that the company was negligent in that it failed to

furnish proper appliances, such as planks or skids with which to handle and unload this heavy barrel of oil from the box car.

The defendant filed a demurrer, on general and special grounds, which was overruled, and exceptions pendente lite were preserved. The general demurrer was based upon two grounds: (1) that the allegations of the petition failed to show a cause of action; and (2) that the allegations affirmatively showed that the injury was caused by an assumed risk of the employment. The special demurrer was based upon the two grounds that the plaintiff failed to allege why he alone took hold of the barrel of oil, when he saw its size, and voluntarily assumed a position of danger; and that he failed to allege the names of the train crew who were absent.

1. There was no error in overruling the demurrer. The allegations plainly set forth a cause of action resulting from the conduct of the conductor as specifically described. The act of the conductor, in pushing the barrel of oil upon the plaintiff without warning, was not an assumed risk of the plaintiff's employment. The petition alleges plainly that the plaintiff took hold of the barrel of oil, notwithstanding its size, in obedience to the order of the conductor, assuming that he would have the assistance of the conductor in rolling the barrel from the car to the ground. The names of the two absent members of the train crew were wholly immaterial, if in fact four were needed as alleged, and only two were furnished. Counsel for the plaintiff in error contends that whatever danger there was in the unloading of this heavy barrel of oil, it was open and obvious to the plaintiff; that he was not misled, and therefore he can not recover, either under the laws of Georgia; or under those of South Carolina, where the injury occurred, and that it was simply a case where the plaintiff made a miscalculation as to his strength or as to the weight of the barrel; and he relies in support of his position upon those cases decided by the Supreme Court which hold that under such facts no cause of action is shown, such as *Worlds v. Georgia Railroad*, 99 Ga. 283 (25 S. E. 646), where the employee was ordered to lift and carry cross-ties unaided some 100 yards; *Central Railway Co. v. Henderson*, 6 Ga. App. 459 (65 S. E. 297), where the employee was ordered to work under a cross-bar resting on two posts, and the cross-bar fell on him; and *Freeman v. Savannah Electric Co.*, 130 Ga. 449 (60 S. E. 1042), where the employee attempted to work a defective

brake. The present case is clearly distinguishable from these cases and kindred cases, in that the petition alleges that the proximate cause of the injury was the conduct of the conductor in pushing the heavy barrel of oil, without warning, upon the plaintiff, and without giving him an opportunity of getting from under it.

2, 3. Certain excerpts from the charge are assigned as error. These excerpts relate to the allegation that the master was negligent in failing to supply a sufficient force of workmen for the operation of the train, and in failing to supply its employees with suitable machinery and appliances for unloading heavy freight. It is insisted that these instructions were not applicable to the case, in that the plaintiff's positive evidence proved that the proximate cause of his injury was the act of the conductor in pushing the barrel of oil directly upon him without warning, and thus excluded the other allegations of negligence. Unquestionably the excerpts objected to contain correct principles of law. They were certainly applicable to the allegations of the petition. But even if they were wholly inapplicable to any of the evidence, we do not think that the defendant was injured thereby, or that the jury were misled into thinking, from the fact that these principles were charged, that there was evidence in the case to which they applied. As a matter of fact the plaintiff testified that there was an insufficient number of hands, and that there was a failure to furnish proper appliances to enable them to unload safely the heavy freight. But regardless of these allegations of negligence, it is manifest that the jury were authorized to find a verdict for the plaintiff, if they believed his testimony as to the act of the conductor in pushing the barrel of oil upon him without warning, irrespective of all the other allegations. In other words, where the evidence shows that the plaintiff was entitled to recover the amount of damages awarded him under one of the allegations on which he relied for recovery, we do not feel that we are required to grant a new trial because there were other allegations as to acts of negligence which he did not prove were proximate causes of his injury. If the jury believed the evidence of the plaintiff (and they had a right to believe it), he was entitled to recover, notwithstanding the fact that there were other allegations on which there was no proof. In our opinion, where two or more causes of negligence are set out in a petition, and damages are claimed also because of a wilful and wanton act

done by an employee in the scope of his employment, the plaintiff would have a right to recover either upon one or more of the acts of negligence alleged, or upon the wilful and wanton act, according to the proof. He would not be required to elect between the acts of negligence and the wilful and wanton conduct, but he could submit his whole case to the jury, and if he proved either one, and this one was the proximate cause of the injury, either alone or in connection with the others, it would be sufficient to sustain a verdict in his behalf. It is not necessary for the jury to agree on one act of negligence, or on the wilful and wanton act. Some of the jury might believe one, and some the other, and the verdict would be authorized, although in arriving at it the jurors pursued different routes. And in such case certainly the defendant would have no right to complain because the judge in his general instructions charged the jury separately as to the rights and defenses relating to the allegations of negligence, and as to the claim of wilful misconduct. This, we think, is what is meant by this court in *Central Ry. Co. v. Moore*, 5 Ga. App. 564 (63 S. E. 642), and by the Supreme Court in *Southern Ry. Co. v. Davis*, 132 Ga. 118 (65 S. E. 131). See also the case of *Boggero v. Southern Ry. Co.*, 63 South Carolina, 104 (41 S. E. 822), relating to the statute of South Carolina applicable to the present case. In this latter case the following charge substantially was approved: "I charge you that in all cases where two or more acts of negligence or other wrongs are set forth in a complaint as causing or contributing to the injury for which suit is brought by plaintiff, the plaintiff is not required to elect upon which alleged act of negligence or wrong he will go to trial, but he is entitled to submit his whole case to the jury, under the instructions of the court, and recover such damages as he has sustained, whether such damages arise from one or all of such acts of wrong alleged in the complaint, provided the jury believe from the evidence that plaintiff was injured, the result of which was due to the negligence of the plaintiff, which was the proximate cause of any or all of the alleged acts of negligence or wrong. That is, the plaintiff is entitled to recover damages both for negligence and wilful misconduct on the part of defendant or its agents, according to proof." What we have said here is applicable to all the excerpts from the charge which are objected to.

4. The plaintiff in error insists that the employee was not in-

jured to the extent that he alleged; that the hernia from which he was suffering was not caused by the heavy barrel of oil being pushed upon him, and by his effort to extricate himself from the danger caused thereby, but that he had previously suffered from this trouble; and, to support this allegation, it submits, as a part of its motion for a new trial, alleged newly discovered testimony. This question was squarely made an issue on the trial, and the evidence was in direct conflict. The alleged newly discovered testimony would simply be cumulative and impeaching in character, and we do not think it would be likely to produce a different result on another trial. This being so, we can not hold that the trial judge abused his discretion in refusing a new trial on this ground.

5. After giving to all the assignments of error a careful consideration, we are satisfied that there was no material error of law committed against the defendant; that while some of the charge was inapplicable, it was not misleading or prejudicial; that the justice of the verdict rests upon the wilful act of the conductor in pushing the barrel of oil on the plaintiff without warning and without giving him an opportunity of escaping the result consequent upon such act. If this was the proximate cause of the injury, the plaintiff was entitled to recover damages; and the jury had the right to believe the evidence of the plaintiff on this subject. The amount of the verdict is not excessive, in view of the injury shown by the testimony of the plaintiff, and of the further fact that the jury were authorized to find that the wrong complained of was attended by circumstances of aggravation.

Judgment affirmed.

3481. HARRIS v. PAULK.

The plaintiff having failed to prove his case as laid, the court did not err in awarding a nonsuit. The facts in the present case differentiate it from the case of *Evans v. Griffin*, 1 Ga. App. 327 (57 S. E. 921). In that case the undertaking of the defendant to assume the obligation of the original debtor, and the absolute release of the latter by the creditor in connection with the assumption of the original debtor's debt by the defendant, created an original undertaking on the part of the defendant; in the present case, as the original debtor was not released, the obligation of the defendant was merely one of suretyship, and therefore was required to be in writing.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Blakely—Judge Rambo. June 19, 1911.

Glessner & Park, for plaintiff. *Byron R. Collins*, for defendant.

RUSSELL, J. Harris sued Paulk in an action of complaint, alleging that the latter, moved by a good consideration set forth in the petition, approached him, and, after certain negotiations, assumed individually certain indebtedness due by one Thompson to the plaintiff, the plaintiff agreeing to release Thompson from the indebtedness. The contract, as set up in the petition, was identical in general details with the one passed upon by this court in *Evans v. Griffin*, 1 *Ga. App.* 327 (57 S. E. 921), and the petition was not demurrable for any reason.

Upon the trial the plaintiff did not prove his case as laid. Instead of proving that Thompson was released, and that Paulk assumed Thompson's debt as an original undertaking, the testimony in behalf of the plaintiff tended merely to show that Paulk became surety for the payment of the indebtedness due by Thompson to the plaintiff. The defendant made a motion for a nonsuit, and, though this motion was overruled when it was first made at the conclusion of the plaintiff's testimony, the court reconsidered this ruling, and, in the course of the testimony for the defendant, awarded a nonsuit.

The facts of the instant case clearly distinguish it from the case of *Evans v. Griffin*, *supra*. In that case "Evans came to Griffin and told him he had hired Jordan for the year 1906, to which Griffin replied that it would be all right, but that Jordan owed him \$39.42, and Evans said, 'Well, I will pay it before I move him.' At the time he moved Jordan, Evans told Griffin he had not sold his cotton, but that he would pay the amount as soon as he sold the cotton. He did not pay the sum so promised; the promise was oral. The plaintiff testified, that while he had not marked the account on his books against Jordan settled, yet he no longer considered or claimed that he still retained the indebtedness against him."

In the present case, Harris testified: "I told him he would have to pay me my money if I released the negro from his agreement to work for me. But he would not agree to that, but said he would pay me half of the amount in the fall of the year, and, if the negro remained on his place for the year 1908, he would see that I got

the balance in the fall of that year. I agreed to this and let him have the negro." On cross-examination he testified: "I charged the negro's account to Joe Jenkins, 'by Louis Thompson,' and I look to Joe Jenkins to pay me. . . I did not release Joe Jenkins. I did not release the negro from his indebtedness to me, but never called on him for payment of it. I may have turned my account against this negro over to a collection agency to collect, but if I did I don't remember it. It is true that after I made this contract with the defendant I looked to all of them for payment, Joe Jenkins, Louis Thompson, and Mr. Paulk. I expected to get my money out of one of them. I did not care who paid me, so long as I got my money."

We think the court was right in construing this testimony as creating nothing more than a contract of suretyship, which, under the statute of frauds, must have been in writing to be enforceable. Even if in a sense the plaintiff proved his case in his direct testimony, yet, on cross-examination, construing his testimony by the rule laid down in *Evans v. Josephine Mills*, 119 Ga. 448 (2), (46 S. E. 674), he disproved his right to recover; consequently the award of a nonsuit was not error. In the case of *Evans v. Griffin*, supra, the creditor accepted the substitution of the defendant in lieu of the original debtor, and absolutely released the latter. In the case at bar, as the creditor testified himself that he had neither released the original debtor nor a former surety, it can not be said that he agreed to an assumption by Paulk of Thompson's liability, as an original undertaking on Paulk's part, in entire substitution for Thompson's prior liability. *Judgment affirmed.*

3482. CENTRAL OIL & FERTILIZER Co. v. MATHEWS.

POWELL, J. While there were certain verbal inaccuracies and minor errors in the charge, all of them, when closely considered in the light of the whole record, plainly fall within the category of harmless error. The verdict is consistent with the justice of the case and the preponderance of the evidence. *Judgment affirmed.*

DECIDED JANUARY 15, 1912.

Garnishment; from city court of Cordele—Judge Whipple presiding. April 18, 1911.

Mather M. Eakes, for plaintiff in error. *Crum & Jones*, contra.

3488. COCHRAN *v.* MINTER, constable.

HILL, C. J. The first grant of a new trial by the judge of the superior court, on certiorari to review a verdict and judgment in a justice's court, will not be disturbed, unless the verdict was demanded by the evidence. If a verdict was demanded at all, it was demanded in favor of the defendant, and not for the plaintiff. *Judgment affirmed.*

DECIDED JANUARY 15, 1912.

Certiorari; from Paulding superior court—Judge Edwards.
April 27, 1911.

W. E. Spinks, for plaintiff.

M. V. Sanford, C. D. McGregor, for defendant.

3493. WHITEHEAD *v.* MAYOR AND COUNCIL OF
VIENNA.

1. A provision in the charter of a city, authorizing the mayor and council to require all male residents of the municipality, between the ages of sixteen and fifty years, who have resided in the city for thirty days, to work the streets of the city, or to pay a commutation tax in lieu thereof, is valid and enforceable as provided therein, although the general law of the State designates the persons subject to road duty, where the alternative road law is in effect, as "between the age of twenty-one and fifty years."
2. A local law for the county of Dooly, in which the city of Vienna is located, providing that the county convicts shall work the main streets through the city of Vienna, does not affect the validity of the charter provision stated in the first headnote. Both local law and charter provisions can be enforced, and there is no conflict between the two.

DECIDED JANUARY 15, 1912.

Certiorari; from Dooly superior court—Judge Whipple. May 29, 1911.

George & Woodward, for plaintiff in error.

HILL, C. J. The State has various schemes, subject to county local option, as to working the rural public roads. Various ages are prescribed as to persons subject to road duty under these different schemes. See *Wright v. Sheppard*, 5 Ga. App. 298 (63 S. E. 48), and citations. None of these enactments relate to the working of streets in towns and cities. As to this the municipal charter in each case controls. *Judgment affirmed.*

3497. NATIONAL PRODUCE DISTRIBUTING CO. v. CAIRO
MELON GROWERS ASSOCIATION.

No material error of law appears; and there is some evidence to support the verdict.

DECIDED JANUARY 15, 1912.

Attachment; from city court of Cairo—S. P. Cain, judge pro hac vice. May 30, 1911.

R. C. Bell, Ira Carlisle, for plaintiffs in error.

M. L. Ledford, contra.

POWELL, J. The general theory of the plaintiffs' case was that the defendants contracted to act as their sales agents, and to aid them in the distribution of their melon crops by directing them how and where to ship and sell most advantageously, and that they breached this contract by negligently advising them, so that they shipped the melons to places where, on account of market conditions, a fair price could not be obtained. Evidence that the melons could have been disposed of at the initial point, for sums largely in excess of the price at which these sales agents sold them at the places to which they directed the melons to be shipped, had some relevancy toward establishing the negligence thus charged by the plaintiffs against the defendants; and the court did not err in admitting the testimony.

Under the contract the defendants agreed to make reports of sales. The plaintiffs offered in evidence certain writings purporting to be sales reports made by the defendants and signed in their name, proving that they came by due course of mail, in envelopes bearing the defendants' return card, and postmarked at their address. The defendants objected on the ground of lack of sufficient proof of execution. As no other sales accounts were received, and as in the absence of these reports the defendants had not accounted for these shipments at all, the error, if any, was not prejudicial. Other similar errors are complained of; but without going into detail (for no novel or important point is presented), we may say, in fine, that the evidence, while not demanding the verdict, authorized it, and that even if any errors were made, they were harmless.

Judgment affirmed.

3501. CHERRY LAKE TURPENTINE CO. v. LANIER ARM-
STRONG CO.

1. The evidence supports the verdict.
2. The following description in a lease is sufficiently definite to identify the property covered thereby, without the aid of parol evidence: "All and singular the timber suitable for turpentine purposes growing on the following described lot of land, to wit, lot number 151 in district 15, land lying in Brooks county, State of Georgia."
3. Standing timber is realty, and a deed thereto should be attested with the same formality as deeds to land. The fact that a deed is attested by only one witness does not affect its validity as between the vendor and the vendee and those who take with actual notice of the deed. The defect in the execution affects only the right to record and the method of proving the execution.
4. While an instrument purporting to convey partnership interest in realty should be signed by the individual members of the partnership, yet the defect is not material, where it is admitted that the instrument, although signed only in the name of the partnership by one of the members, was in fact made by authority of all the partners and for the partnership interest, and in pursuance of the partnership business.
5. The undisputed evidence shows that the defendant had actual knowledge of the execution of the prior leases of the plaintiff when the trespasses complained of were committed. In view of this fact, any mere technical defects in the formal execution of any of the leases held by the plaintiff should not protect the defendant from liability for admitted trespasses resulting in damage to the plaintiff.
6. No material error of law appears.

DECIDED JANUARY 15, 1912.

Trespass; from city court of Quitman—Judge McCall. April 21, 1911.

Bennet & Long, for plaintiff in error.

Branch & Snow, contra.

HILL, C. J. Lanier Armstrong Company brought suit in the city court of Quitman against Cherry Lake Turpentine Company, to recover damages for alleged trespasses, alleging, that on November 15, 1907, it was the owner by lease of all the timber suitable for turpentine purposes on described lots of land in Brooks county, Georgia; that there was a sufficient number of pine trees on these lands to cut 25,000 turpentine boxes of the aggregate value of \$3,750; that on said date the defendant entered upon these lands without legal authority or right, unlawfully took possession of the timber thereon suitable for turpentine purposes, and boxed it, and since said date had exclusively appropriated to its own use this timber, adversely to the plaintiff's rights, and had been since

said date, and was still, at the time of the filing of this suit, extracting turpentine from the timber. The defendant admitted that it was using the timber described in the petition, but contended that it had a right to do so under leases which it fully set up in its plea. The jury found a verdict in favor of the plaintiff, for \$2,075.02; the defendant's motion for a new trial was overruled, and the case is here for review. On the trial it was admitted that both plaintiff and defendant claimed the timber in dispute and the right to take the turpentine therefrom, under common grantors, and it was not denied by the defendant that it was cutting timber on the land for turpentine and was extracting turpentine therefrom. The evidence showed that the lease under which the plaintiff held the timber and the right to the turpentine was prior in date and was recorded prior to the lease held by the defendant; and the evidence for the plaintiff also showed that the defendant had actual notice of the existence of this lease when it took its lease and entered upon the land, taking possession of the timber and boxing the same for turpentine. The leases under which both parties claimed were introduced in evidence and their execution was sufficiently proved. Their terms and conditions will be referred to as it becomes necessary to illustrate the questions raised by the record and discussed in the course of the opinion. Defendant's motion for a new trial contains numerous assignments of error, but the same questions are substantially made in several grounds of the motion, and it is unnecessary to consider the grounds seriatim.

1. The general grounds of the motion may be disposed of by the statement that the only questions at issue between the parties were as to the value of the turpentine which the defendant had taken from the trees, and whether or not the plaintiff had exercised its right under the lease to take the turpentine from the timber within a reasonable time. The other questions of fact are controlled by assignments of error in law, and need not be separately considered. There was evidence to support the verdict, and, having been approved by the court, it will not be disturbed unless material error of law appears.

2. The leases under which the plaintiff claims title to the timber were all attested by only one witness, and all were recorded in the clerk's office of the superior court of the county

where the timber was located. The defendant objected to the admission of these leases in evidence, (a) because the description of the property conveyed therein was too vague and indefinite; (b) because the leases were not attested by two witnesses, it being insisted that, being conveyances of an interest in land, it was necessary that they be executed as deeds and attested by two witnesses, one of them an official witness; (c) that, without such attestation, their record was unauthorized, and therefore afforded no constructive notice. These objections apply specifically to what is known as the White lease, which is the lease under which both parties claim from a common grantor. Here it may be stated that the leases under which the defendant claimed were properly attested as deeds and were properly admitted to record. The description contained in the White lease, through which the plaintiff claimed title, described the property as follows: "All and singular the timber suitable for turpentine purposes growing on the following described lot of land, to wit, lot number 151 in district 15, land lying in Brooks county, State of Georgia." Was this description sufficiently definite? It gives the number of the lot of land, the district in which located, and the county and State. The only particular in which this description is not absolutely specific and definite is in the fact that it does not state the number of acres contained in the lot of land. We do not think this important, in view of the fact that it does convey "all and singular the timber suitable for turpentine purposes growing on" the land lot mentioned. It is wholly immaterial how many acres the land lot contained. All the timber located thereon suitable for turpentine purposes was specifically conveyed by the instrument. In the case of *Carter v. Williamson*, 106 Ga. 280 (31 S. E. 651), the Supreme Court held that a description in the same language as the above was unambiguous and clear, and conveyed all the timber standing on the lands described in the lease. The cases cited by counsel for plaintiff in error in support of the contention that the description was vague and indefinite are distinguishable on the facts from the present case. In *Douglass v. Bunn*, 110 Ga. 162 (35 S. E. 339), the conveyance failed to designate the number of the lot, or the county or district in which it was situated. In *Clarke v. Stowe*, 132 Ga. 621 (64 S. E. 786), the description was: "all that tract or parcel

of land known as lot 162½ acres of lot 169 in the 6th district of Montgomery county, Georgia." The 162½ acres of land in the land lot were not specifically described. In the present deed, as above suggested, it was immaterial to describe the number of acres in the land lot, because all the timber thereon suitable for turpentine purposes was covered by the lease. Where a deed conveys a designated number of acres, it should indicate by boundaries, or other description, the particular number of acres conveyed, in order to furnish indicia by which the particular tract in the land lot could be identified. The words of description in the *Clarke* case, supra, were not even sufficient to furnish a basis for making more specific the description by parol testimony.

The other cases cited by learned counsel,—*Crosby v. McGraw*, 133 Ga. 560 (66 S. E. 897), *Richardson v. Perrin*, 133 Ga. 721 (66 S. E. 899), *Singleton v. Close*, 130 Ga. 717 (61 S. E. 722), and *Harper v. Keller*, 110 Ga. 420 (35 S. E. 667),—are all distinguishable from the present case, so far as they relate to the description of the property conveyed.

3. The next objection made to the admissibility of what is known as the "White lease," under which the plaintiff claimed title, was that it was not attested by two witnesses, nor by a notary public or other judicial officer. This objection is based upon the contention that timber is realty, and that a conveyance of all the timber suitable for turpentine purposes was a sale of realty. In numerous cases the Supreme Court of this State has held that standing timber is realty, and that conveyances of standing timber are to be treated as deeds and are to be executed with the same formality, and in fact have all the incidents of ordinary deeds to realty. *Powell on Actions for Land*, § 54; *Coody v. Gress Lumber Co.*, 82 Ga. 793 (10 S. E. 218); *McRae v. Stillwell*, 111 Ga. 65 (36 S. E. 604, 55 L. R. A. 513); *McLendon v. Finch*, 2 Ga. App. 42 (58 S. E. 690), and citations. The fact, however, that a deed to realty is not properly attested does not affect its validity between the parties thereto and their privies. The defect in the attestation relates to the right of recordation and to the method of proof. In the present case, while the deeds conveying the timber rights to the plaintiff were not attested by two witnesses, and therefore were not properly recorded, their execution was not denied, and in fact it was admitted by the de-

fendant that, when it took its subsequent lease covering the same property, it took with actual notice of the existence of this prior conveyance. It follows, therefore, that it was wholly immaterial, so far as any right of the defendant was concerned, that these deeds were not attested as deeds to realty. In the case of *Coody v. Gress Lumber Co.*, supra, it was distinctly held that the failure to have attesting witnesses to a deed did not render the instrument void, and that, upon proper proof of its execution, it was admissible in evidence. See also, to the same effect, *Parker v. Gortatowsky*, 127 Ga. 561 (56 S. E. 846). It is too well settled to require further citation of authority that an improper attestation does not affect the validity of a deed, but only its fitness for record and the method of proving its execution. The deed is still a valid contract and is binding upon any one who subsequently takes with notice of its existence. *Johnson v. Jones*, 87 Ga. 65 (13 S. E. 261); *Lowe v. Allen*, 68 Ga. 226; *Gardner v. Moore*, 51 Ga. 268; *King v. Sears*, 91 Ga. 577 (18 S. E. 830).

4. The next assignment of error is that the transfer of the White lease, relied upon by the plaintiff in the court below as one of the links in the chain of title, was improperly executed and was invalid, in that the transfer was made by one of two partners in the partnership name and was not signed by the individual members of the firm. This objection is based upon the idea that a deed or lease to take the turpentine from standing trees conveys realty and that the title was vested in the members of the partnership as tenants in common. This objection would be material but for an admission made in the record. The transfer in question was made by J. F. Fender in the name of Fender, Tomblinson & Company and it was admitted that the transfer of the lease in question by J. F. Fender was made "for the partnership and by the authority of each member thereof and in the due course of the partnership business." This admission cures the formal defect in the execution of the transfer or assignment, so far as this defendant is concerned, and places in the transferee all the title of the firm as well as of the individual members thereof to the property described in the transfer. In view of this admission it is not necessary to discuss the point raised in the brief of learned counsel for defendant in error that a transfer of the right to take crude turpentine from growing

trees is in the nature of a usufruct, especially where the transfer is by lease during a period stipulated for a less time than five years, and that this is distinguishable from an alienation of an interest in land.

5. It is next objected that this transfer by the partnership of the lease in question to the plaintiff was incompetent to be admitted in evidence, because the transfer was not in fact dated. The failure to date the transfer is not material, in view of the fact that the defendant had actual knowledge of the previous existence of the lease when it took the lease under which it claims. Besides, the parol evidence shows that all of the transfers of the White lease in question were made on the same day, to wit, January 25, 1907, and this was prior to the date of the instrument under which the defendant claimed its right.

The defendant in the court below offered evidence to prove that there was a parol agreement, before the leases were signed and the transfer made to the plaintiff, that the boxing of the timber should commence at once, and this testimony was excluded. There was no effort to show that the time limit was left out of the contract, either by accident or mistake. In the absence of the time limit the law would give the lessee a reasonable time within which to exercise its rights under the lease, the reasonable time being a question of fact to be determined by the jury. The rule laid down on this subject as to what would be a reasonable time would be dependent altogether upon the local conditions and the peculiar circumstances of each case. *McRae v. Stillwell*, supra; *Lufburrow v. Everett*, 113 Ga. 1056 (39 S. E. 436); *Goette v. Lane*, 111 Ga. 400 (36 S. E. 758). Besides, it further appeared from the leases to previous grantees, under which plaintiff in the court below claimed title, that from three to four years were allowed for the purpose of working timber for turpentine purposes after the boxing thereof, and that before the expiration of this period of three or four years the alleged trespass by the defendant had been committed.

We have considered all the assignments of error that we think material to be decided, and we conclude that the verdict was right. The plaintiff in error knew that these prior leases were outstanding and in the plaintiff in the court below, and that it had been in the actual exercise of these rights, and we are satisfied

that the verdict, under the evidence, was just, right, and equitable. The defenses relied upon are in the main purely technical. The essential facts are,—that the plaintiff held a prior written contract, under which it had the right to all of the turpentine in the timber on the land in question; that the defendant knew of this prior right, and with this knowledge took conveyances, and under these conveyances as an excuse entered upon the land in question and deprived the plaintiff of a very large amount of the profits which it could have realized under its contract; and that the amount of turpentine which it took from the trees, to which the plaintiff was entitled under its previous contract, was larger than the amount of the verdict which the jury found against it. We are impressed with the view that the defendant in the court below simply took the chance of defeating the rights of the plaintiff on mere technicalities, and in the meantime securing for itself a large amount of turpentine to which it was not equitably entitled, and that, to a certain extent at least, this chance of speculation or profit has been reaped by it to the damage of the plaintiff. *Judgment affirmed.*

3502. FRANKLIN LIFE INSURANCE CO. v. BOYKIN.

RUSSELL, J. It being undisputed, in the evidence, that the insured retained in his possession the policy of insurance (with a receipt, acknowledging the payment of the first premium, attached thereto), and made no effort to return the contract of insurance to the insurer, merely expressing dissatisfaction therewith and inability to pay the note given for the premium, a verdict for the defendant, in a suit brought by the insurance company upon a note given for a premium upon the policy, was contrary to law. The insured can not defeat payment of the premium upon a policy of insurance, issued at his instance, while he still retains the contract, the very issuance and delivery of which depend upon a cross-obligation that the premiums will be paid.

Judgment reversed.

DECIDED JANUARY 15, 1912.

Complaint; from city court of LaGrange—Judge Harwell. May 13, 1911.

E. T. Moon, for plaintiff in error. *E. A. Jones*, contra.

3506. BROOKE v. WALLER & Co.

POWELL, J. Counsel for the defendants in error moved to dismiss the bill of exceptions because it sets out both the oral and the documentary evidence without briefing in accordance with the statute. Upon an inspection of the record the motion is found to be well taken, especially as to the documentary evidence. The motion is granted.

Writ of error dismissed.

DECIDED JANUARY 15, 1912.

Motion to dismiss writ of error.

Finley & Henson, for plaintiff in error.

Paul F. Akin, Watt H. Milner, contra.

3507. BECKWITH v. MANSFIELD LUMBER & CONSTRUCTION Co.

HILL, C. J. 1. A judgment in favor of the defendant, upon a plea in abatement not affecting the merits of the case, can not be successfully pleaded in bar of a subsequent suit on the same cause of action.

2. No error of law appears, and the evidence fully supports the verdict.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Covington—Judge Whaley. May 20, 1911.

Rogers & Knox, for plaintiff in error.

R. W. Milner, contra.

3508. BECKWITH v. MANSFIELD LUMBER & CONSTRUCTION Co.

HILL, C. J. This case is controlled by the decision of this court handed down this day in *Beckwith v. Mansfield Lumber & Construction Co.* (No. 3507), ante.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Covington—Judge Whaley. May 20, 1911.

Rogers & Knox, for plaintiff in error.

R. W. Milner, contra.

3511. GARLAND v. RUMBLE.

HILL, C. J. A client sued his attorney for money had and received by the attorney for the client's benefit. The client had placed in the hands of the attorney a note for collection; and the attorney collected it and retained half of the amount as a fee for his services. The client contended that he had made no contract for fees, and that the attorney was entitled only to a quantum meruit for his services. The attorney contended that he had a verbal contract which entitled him to retain half of the amount collected. This was the sole issue in the case, and the jury found in favor of the client, and no error of law is complained of. As repeatedly ruled, the verdict settled the issue of fact, and this court can not interfere. *Judgment affirmed.*

DECIDED JANUARY 15, 1912.

Appeal; from Pike superior court—Judge R. T. Daniel. April 5, 1911.

E. C. Armistead, J. J. Garland, for plaintiff in error.

J. M. Smith, contra.

3514. GREENE COUNTY v. WALKER.

Whether the county was negligent in its maintenance of the bridge in question, and whether it was contributory negligence on the part of the owner of a colt, three and a half months old, to permit so immature a specimen of the equine genus to accompany the maternal mare in public places, were questions peculiarly for the determination of a jury. Consequently a verdict awarding damages to the owner of the colt for injuries inflicted upon it by reason of its falling through a hole in a public bridge, which is supported by evidence and which has been approved by the trial judge, will not be set aside as being contrary to law.

DECIDED JANUARY 15, 1912.

Appeal; from Greene superior court—Judge Walker. May 30, 1911.

Noel P. Park, for plaintiff in error. *J. G. Faust*, contra.

RUSSELL, J. Walker brought a suit against Greene County for damages alleged to have been sustained by him as the owner of a colt injured by getting caught in a hole in one of the public bridges of the county. Upon the trial the evidence was undisputed that the value of the colt had been diminished by reason of the casualty, and that there was a hole in the public bridge which had existed for such a length of time as to authorize the jury to infer that the proper county authorities had knowledge of its existence. It de-

veloped that the plaintiff was driving a mare, and that the colt was accompanying its mother. The defendant pleaded that if the colt was injured as alleged in the petition, the injury was caused by the negligence of the plaintiff, and therefore the defendant was not liable in any sum, and that if the plaintiff had used ordinary care and diligence, the injury could have been avoided. Under the first ground of the defense, it is contended that even if knowledge of the defect in the bridge can, under the evidence, be presumed as against the county authorities, still there was proof that vehicles could cross with safety, for the reason that the hole was towards the edge of the bridge and was not large enough for a grown horse to get its foot through; and for this reason it is contended that the bridge was in a satisfactory condition for all ordinary purposes. The decision of this court in *Stamps v. Newton County*, 8 Ga. App. 230 (5), (68 S. E. 947), is cited as authority to sustain the contention that the use of the bridge by the colt gave rise to an extraordinary occasion.

As to the second ground of defense, it is insisted that the owner of the colt knew that the hole was in the bridge, and that the defendant should not be held liable, because, in the exercise of ordinary care and diligence, the owner should either have left the colt at home, and not permitted it upon the public highway, or should have made a special effort to see to the colt's safety while it was crossing the bridge. Without making any comparison between the case at bar and the *Stamps* case, *supra*, it is enough for us to say that whether the presence of a colt upon a public bridge gave rise to such an extraordinary occasion as could not have been foreseen by the county authorities, and as might relieve the county from liability for damages, is a question purely for determination by a jury. It is possible that there might be instances in which the circumstances of the accident would authorize the jury to conclude that the occasion was extraordinary. The presence of a colt which had strayed away from home, and which appeared upon a bridge containing such a hole, unaccompanied by its mother, or, even if accompanied by its mother, if the mare was running at large, might afford such an instance, but at last it would be a question for the jury, as in the *Stamps* case (and not for the court), after a consideration of all of the surrounding circumstances. No court can arbitrarily say that under no circumstances can the owner of a colt

be recompensed for injuries due and traceable to defects in a public highway, because of the fact that the colt was of no service upon the public highway, or because the presence of the colt created an extraordinary occasion.

Likewise, the question as to whether the owner of a colt, in the exercise of ordinary care and diligence, should, in any particular instance, keep the colt at home, and not permit it to follow its mother as is frequently the custom, is one also peculiarly of fact and to be determined by the jury. All of the circumstances illustrating the alleged negligence of the county in this case, as well as the contributory negligence, if any, of the owner, were fully submitted for the consideration of the jury; and jurors are so much better qualified than judges to say when and where, and under what circumstances, a young colt can safely accompany its mother, that we are not prepared to say that there was any error in the verdict in the present case.

It is not contended that any error of law was committed by the trial judge. The only error assigned is the refusal of the motion for new trial based upon the general grounds, and, as we doubt not that the ruling of the trial judge was based upon the same considerations as those which affect us, the judgment must be *Affirmed*.

3516. LOUISVILLE & NASHVILLE RAILROAD CO. v. ANDREWS.

HILL, C. J. 1. The exceptions taken to excerpts from the charge are supported by verbal inaccuracies, but there were no substantial or misleading errors; and the instructions, taken as a whole, fairly and clearly presented the issues.

2. There was conflict in the evidence, both as to the negligence alleged and the damages claimed. These conflicts were settled by the verdict; and as no error of law of a prejudicial character appears, no reason is shown for the grant of another trial. *Judgment affirmed.*

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Atlanta—Judge Calhoun. April 15, 1911.

Tye, Peebles & Jordan, for plaintiff in error.

Walter A. Sims, contra.

3523. CLEMENTS v. UNION SAVINGS BANK.

HILL, C. J. The evidence demanded the verdict as directed for the plaintiff.
Judgment affirmed.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Swainsboro—Judge H. R. Daniel.
April 24, 1911.

Williams & Bradley, for plaintiff in error.

3524. NUNEZ GIN & WAREHOUSE CO. v. MOORE.

RUSSELL, J. Where a gin and warehouse company holds out a person as its general manager, the title implies power to make any contracts ordinarily necessary for the conduct of its business. Authority to execute a promissory note for the purchase of an engine and boiler, and to bind the corporation for its payment, would be presumed to be within the scope of the general manager's authority. But neither the general manager nor any other officer of a corporation has power or authority to purchase its capital stock and bind the corporation for the payment therefor, by promissory note or otherwise. Parol evidence is always admissible to show the consideration of a note; and consequently the court erred in striking the plea of the defendant, and in excluding testimony offered by it tending to show that the note in the present case was given to pay for \$250 of the amount of stock subscribed by the defendant; and especially as the payment, if made, would result in the purchase of that amount of stock by the corporation itself, or the reduction of the capital stock in that amount. *Judgment reversed.*

DECIDED JANUARY 15, 1912.

Complaint; from city court of Swainsboro—Judge H. R. Daniel.
May 23, 1911.

T. N. Brown, for plaintiff in error.

Smith & Kirkland, contra.

3525. RAWLINGS v. SHEPPARD.

POWELL, J. 1. To establish a right to recover under the act of December 17, 1901 (Acts 1901, p. 63), as amended by the act of August 2, 1903 (Acts 1903, p. 91), now contained in the Civil Code (1910), §§ 3712-15, giving damages to a landlord for wrongful interference by an outsider with his contract with his tenant, the plaintiff must prove: (1) a valid, definite contract, duly executed with the formality pre-

scribed in the statute (*Polk v. Thomason*, 130 Ga. 542 (61 S. E. 123); *Orr v. Hardin*, 4 Ga. App. 382 (61 S. E. 518)); (2) the fact that the defendant employed the tenant for such a period and in such a manner as that injury resulted to the landlord from the giving of the employment, or that the defendant rented lands to the tenant or furnished him lands to be "cropped;" (3) the amount of the damages, except in so far as the statute fixes them. To prove that the defendant allowed the plaintiff's tenant to move into a house on his place is not sufficient. *Pearson v. Bass*, 132 Ga. 117 (63 S. E. 798).

2. The plaintiff in the case at bar offered no direct proof that the defendant employed the tenant or rented lands to him, but relied on circumstantial evidence to prove that element of his case. The jurors were authorized to find against the theory of the evidence contended for by the plaintiff, though the defendant offered no proof. A verdict is not necessarily demanded for the plaintiff because he makes such a prima facie case as to make the refusal to grant a nonsuit proper, though the defendant introduces no evidence. *Judgment affirmed.*

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Sandersville—Judge Jordan. May 3, 1911.

Hardwick & Wright, for plaintiff in error.

Evans & Evans, contra.

3526. CENTRAL OF GEORGIA RAILWAY CO. v. MARSHALL.

HILL, C. J. This is a case of certiorari, brought to review a verdict and judgment for \$17, and raising only issues of fact, on which the evidence was in conflict. The judgment of the superior court, approving the verdict and overruling the certiorari, will not be disturbed.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Certiorari; from Bibb superior court—Judge Felton. June 7, 1911.

West & Dasher, for plaintiff in error.

Oliver C. Hancock, contra.

3527. COOPER v. MOST NURSERY COMPANY.

1. A suit for damages which had been sustained by the plaintiff more than five years prior to the issuance of the attachment against one who was a non-resident throughout that period was barred by the statute of limitations.

2. The plaintiff's right to proceed by attachment depended upon the non-residence of the defendant. The allegation that the defendant was a non-resident was not stricken by amendment, and could not have been stricken without resulting in the dismissal of the case; and the absence or non-residence of a debtor who never resided in this State is no reply to the statute of limitations.

DECIDED JANUARY 15, 1912.

Attachment; from city court of Floyd county—Judge Reece. June 5, 1911.

M. B. Eubanks, for plaintiff.

George A. H. Harris & Son, for defendant.

RUSSELL, J. Mrs. M. A. Cooper sued out an attachment against P. P. Most Nursery Company, alleging the non-residence of the defendant, as the ground of attachment. The attachment was served by the service of summons of garnishment on a garnishee residing in Floyd county, on June 7, 1910. Upon the filing of a declaration in attachment the defendant demurred, seeking to interpose the bar of the statute of limitations. The court sustained the demurrer and dismissed the plaintiff's action, and thereupon the plaintiff sued out the present writ of error.

According to the allegations of the declaration, P. P. Most Nursery Company, whose name imports a corporation, is not a resident of the State of Georgia; and it is not alleged that the defendant was at any time a corporation of this State. If the defendant ever was a non-resident corporation, it must be presumed to have continued to be such; because it could only become a corporation of the State of Georgia by obtaining a charter here. The lower court allowed an amendment to the petition, setting up that at the time the cause of action accrued this non-resident corporation had as an agent residing in Floyd county one Maples; and by the amendment it was sought to relieve the bar of the statute of limitations by allegations to the effect that Maples represented that P. P. Most Nursery Company was a Georgia corporation, which was false, and the statement was made with intent to defraud, and that after the plaintiff's right of action accrued, she made every endeavor to locate Maples and the defendant, but failed to do so.

The only question in the case is whether the amendments to the plaintiff's petition are such as would relieve from the bar of the statute of limitations a cause of action apparently almost six years old, in which the plaintiff sought to recover damages resulting

from misrepresentation and deliberate breach of a contract to furnish specified varieties of peach trees for the plaintiff's orchard. Under the allegations of the original petition the action is plainly barred; for it is alleged that the plaintiff ascertained in 1904 that she had not been furnished with the varieties of trees she had bought, and as far back as 1904 she knew she had been deceived by the agent of this non-resident corporation, and yet she took no step to recover her damages until 1910. The plaintiff attempts, by amendment, to relieve the defect in the action, by allegations to the effect that she had made every effort to ascertain the residence of the defendant, but had failed, and allegations to the effect that Maples, up to the time that she discovered the fraud that had been practiced upon her, resided in Floyd county, and that Maples, at the time she purchased the fruit trees, told her that the P. P. Most Nursery Company was a Georgia corporation. It is the plaintiff's misfortune if she could not find out the defendant's whereabouts in six years, but the result of the delay can not be affected by any of the circumstances alleged in the amendment to her petition. The law presumes that four years is sufficient time for a plaintiff to ascertain all the necessary facts upon which to base a suit, and mere inability to do this, which is not directly chargeable to the opposite party, is ineffectual to prevent the bar of the statute of limitations. Fraud on the part of the opposite party, where it is apparent that such fraud prevented the earlier assertion of one's rights, might relieve from the bar, but, according to the allegations in the present petition, all the fraudulent acts and sayings of Maples, the agent of the defendant, occurred before 1904; and in 1904, when the peach trees began to bear, and the fraud, if any, was discovered, the plaintiff knew just as much of Maples's fraud, and just as much of the whereabouts of the defendant, as she did in 1910, at the end of a six years' search for Maples and for the residence of the P. P. Most Nursery Company.

The allegations of the petition, as a whole, do not tend to distinctly negative the inference that the P. P. Most Nursery Company may be doing business in Georgia, and that they may now have, and may have had for six years preceding the suit, agents in Georgia upon whom service could have been perfected; but, as we have previously remarked, the mere fact that the plaintiff was unable for six years, after the discovery of the fraud, to ascer-

tain the whereabouts of the defendant, affords no exception to the general rule which bars a cause of action, which, like the present, is required to have been prosecuted in four years. The plaintiff could not amend her declaration so as to strike the allegation that P. P. Most Nursery Company resides out of the State of Georgia, without destroying the only ground upon which the attachment rested; and the fact that Maples had moved from Georgia to Texas, or that she was unable to locate the defendant, or any of its officers or agents, or to find any property belonging to the defendant which might be seized by attachment, presents no legal reason for relieving the action from the bar of the statute of limitations. According to the allegations of her own petition, the plaintiff discovered the breach of the contract on July 15, 1904, and had the attachment served on June 7, 1910. The demurrer was properly sustained.

The fact that Maples told the plaintiff that his principal, the P. P. Most Nursery Company, resided in Georgia, is of no consequence. The allegation which might have relieved the bar of the statute must have been that P. P. Most Nursery Company, as a matter of fact, did reside in Georgia; and yet, if the Nursery Company merely resided at some time in the past in Georgia, being a Georgia corporation, the removal of the corporation to another State would not of itself change its legal residence. In order to become a resident of another State, a corporation must be chartered in that State, or at least its principal office must, by its charter, be declared to be in that State; and, as a corporation can have no legal residence except as determined by its charter, the incorporation of a domestic corporation in another State would create it a corporation of that State, as a new corporation, entirely apart from the fact that there may have been a previous incorporation in some other State; thus rendering the previous residence of the parties who might be incorporators or stockholders in the corporation, whether in this State or in some other, totally immaterial. The plaintiff could not have made an allegation upon this subject which would have been of any value, because the residence of a corporation is fixed by its charter, and the absence or non-residence of a debtor who never resided here is no reply to the statute of limitations. 9 Enc. Dig. Ga. Rep. 36; *Edwards v. Ross*, 58 Ga. 147.

Judgment affirmed.

3541. CROWDER *v.* THE STATE.

RUSSELL, J. There was no evidence that the killing of the hog was malicious. The only evidence from which it was contended malice could be inferred was that the accused did not have a fence at least four and a half feet high around his crop, to prevent the destruction of which the animal was killed. In stock-law counties land lines supply the place of the statutory fence.

Judgment reversed.

DECIDED JANUARY 15, 1912.

Accusation of malicious mischief; from city court of Sandersville—Judge Jordan. May 19, 1911.

W. E. Armistead, for plaintiff in error.

J. E. Hyman, solicitor, contra.

3548. EDENFIELD *v.* COLEMAN & FLANDERS.

HILL, C. J. In a note given for the purchase-money of two mules the following guaranty was inserted: "It is expressly understood that after said delivery the said Coleman & Flanders do not warrant the health, soundness, or life of said mules, but only the title thereto, and in case of death thereof or loss in any way, I agree to sustain the loss and to pay said note." In a suit on this note a plea alleging in effect that at the time of the sale and when the mules were delivered they were afflicted with an incurable disease, the character of which was not known to the defendant but was known to plaintiff, and from which disease the mules in question died in a few days after the sale, set forth a good defense, and was not in conflict with the well-established rule that parol testimony can not be received to vary the terms of a written contract. *Pryor v. Ludden*, 134 Ga. 288 (67 S. E. 654). The above guaranty protected the guarantor from any unsoundness or disease and death which might arise or occur after the sale was made and after delivery of the mules to the purchaser. It is not broad enough to protect the guarantor from any latent disease or unsoundness which existed prior to and at the time of the sale and the existence of which was known to the seller and unknown to the purchaser.

Judgment reversed.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Swainsboro—Judge H. R. Daniel. May 25, 1911.

Saffold & Larsen, for plaintiff in error.

Williams & Bradley, contra.

3557. PARK *v.* BUXTON *et al.*

1. The law of this State declares that "any circumstances which would place a prudent man upon his guard, in purchasing negotiable paper, shall be sufficient to constitute notice to a purchaser of such paper before it is due." The character and sufficiency of the circumstances in a particular case which should place a prudent man on his guard are to be determined as questions of fact by the jury, and not by the judge as questions of law.
2. The promise to pay the interest on a negotiable note is as much a part of the contract as the promise to pay the principal. Principal and interest constitute one debt. When the note is sold to a third person before the principal is due, but when installments of interest are past due, and remain unpaid, and the fact of non-payment appears on the face of the note or is actually known to the purchaser, it is for the jury to determine whether these facts were circumstances sufficient to put the purchaser, as a prudent man, on his guard and to furnish to him warning that the maker of the note had some defense. Proof of these facts authorizes the jury to find that the purchaser bought the note with notice that it was then dishonored; and he would not be protected in his title against any defense that the maker could make if the note were sued on by the original payee.
3. There was evidence to support the plea of total failure of the consideration for which the note was given, and no reason appears for the grant of another trial.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Waynesboro—Judge Boykin presiding. June 16, 1911.

H. J. Fullbright, F. S. Burney, for plaintiff.

William H. Fleming, C. B. Garlick, for defendant.

HILL, C. J. Howard C. Park sued W. R. Buxton and others as makers of a promissory note, alleging, that he was a bona fide holder for value, that he bought the note before it was due and without any notice of any defect or defense. The defendants denied these allegations, and on the issue thus formed and the evidence, under the charge of the court, the jury found a verdict in favor of the defendants, and the plaintiff's motion for a new trial was overruled. The evidence, briefly stated, is as follows: The note was one of three notes for \$1,000 each, payable to McLaughlin Brothers, or order, and dated April 8, 1906, the first note falling due May 1, 1907, the second in 1908, and the third in 1909. The consideration of the notes was a high-bred stallion, purchased under express warranties as to the quality of the stallion, and the defense relied upon was a breach of these warranties. This de-

fense was met by the contention of the plaintiff that as he was a bona fide purchaser for value before maturity, without notice of any defect or defense, this defense of failure of consideration could not be made to the note in his hands. There was a credit of \$200 on the principal of the note, leaving a balance of \$800 due. The plaintiff paid \$850 for the note to McLaughlin Brothers, the original payees, and at the time of the purchase the principal of the note had not matured, but would have matured in twelve days. Two installments of annual interest, amounting to \$96 at the time of the purchase, were past due and unpaid. The face of the note did not show this fact, but the plaintiff admitted that he knew the fact when he purchased the note.

The principal question of law presented is: Does the purchaser for value of a negotiable promissory note before the principal thereof is due, with knowledge that installments of interest thereon are past due and unpaid, stand in the position of a bona fide holder, and is he protected as such under section 4286 of the Civil Code (1910); or does the fact that installments of interest are past due, and his knowledge of the fact, constitute sufficient reason to dishonor the principal of the note and let in all defenses good against the original payee? The plaintiff in error insists that, as a matter of law, the simple fact that installments of interest are overdue and unpaid, disconnected from other facts, is not of itself sufficient to affect the position of one taking the note before maturity of the principal for value, as a bona fide purchaser, and that it was the duty of the trial judge so to instruct the jury. The trial judge refused so to instruct the jury as a matter of law, but submitted the question to them as one of fact, charging to the effect that it was for the jury to decide whether the non-payment of the interest and the knowledge of that fact by the plaintiff at the time he purchased the note was a circumstance which would place a prudent man upon his guard in purchasing negotiable paper.

The question of law here presented has never been directly decided by the Supreme Court of this State, and the decisions in other jurisdictions are in conflict. Some of the decisions holding that default in the payment of interest, with a knowledge of that fact by the purchaser, does not dishonor the note and is not a sufficient circumstance of suspicion to put the purchaser upon further inquiry, are *Indiana & Ill. Ry. Co. v. Sprague*, 103 U. S. 756 (26

L. ed. 554); *Cromwell v. Sac County*, 96 U. S. 51 (24 L. ed. 681); *Thomason v. Perrine*, 103 U. S. 589 (1 Sup. Ct. 564, 568, 27 L. ed. 298); *Nat. Bank v. Kirby*, 108 Mass. 497; *Kelly v. Whitney*, 45 Wis. 110 (30 Am. R. 697); and some of those taking the opposite view are *Newell v. Gregg*, 51 Barb. (N. Y.) 263; *Citizens Savings Bank v. Couse*, 124 N. Y. Supp. 79 (68 Misc. Rep. 153); *First Nat. Bank v. Forsyth*, 67 Minn. 257 (69 N. W. 909, 64 Am. St. R. 415). The United States Supreme Court, in the case of *Trask v. Jacksonville, Pensacola & Mobile R. Co.*, 124 U. S. 515 (8 Sup. Ct. 574, 31 L. ed. 521), in seeming conflict with prior decisions on the same subject, holds, that where interest coupons attached to bonds of the State had not been paid for ten years, this fact furnished the strongest presumptive evidence of dishonor. The court in this latter case seemed to attach significance to the fact that so many of the interest coupons were unpaid, and the fact that the bonds were issued by the State; and the peculiar facts of the case seem to have made the conflict between this decision and prior decisions more apparent than real. As illustrating the conflict in the decisions of the courts on this subject, it may be noted that those courts which hold that the mere fact of default in the payment of interest is not of itself sufficient to dishonor the note and to put the purchaser on notice and destroy his character as a bona fide holder, repudiate the doctrine that as to negotiable paper mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is sufficient to impair the title of the purchaser, and hold that this result would follow only where there had been bad faith on his part. See *Murray v. Lardner*, 2 Wall. 110 (17 L. ed. 857), where the leading authorities on this subject are collated and considered. The doctrine, however, that the purchaser of such paper, under circumstances of suspicion calculated to put a prudent man upon inquiry, does so at his risk, seems to be the rule in this State. The Civil Code (1910), § 4291, provides that "Any circumstances which would place a prudent man upon his guard, in purchasing negotiable paper, shall be sufficient to constitute notice to a purchaser of such paper before it is due." What would be sufficient to place a prudent man upon his guard in purchasing negotiable paper is necessarily a question of fact. It can not in any case be a question of law. In this State the trial

judge can not instruct the jury what a prudent man should do, or would do, under certain circumstances; for, as Chief Justice Bleckley says in the case of *R. & D. R. Co. v. Howard*, 79 Ga. 53, "in legal contemplation the jury know it better than the court." Looking at the question abstractly, it would seem that negotiable paper is dishonored by any breach of the engagement which it imports, and that any fact which would tend to show that the paper was disgraced would destroy its character of negotiability. In other words, if there is upon the face of the paper anything indicative of dishonor, the purchaser takes it at his peril.

A promise to pay a negotiable promissory note applies to the interest as well as to the principal. There is but the one promise, and the interest is just as much a part of the debt as the principal, and the obligation to pay the interest is as strong as the obligation to pay the principal, and a failure to pay the interest would indicate that the promisor had broken his promise and had dishonored and destroyed the negotiable character of the obligation; or, as otherwise expressed, anything that dishonors any part of a note dishonors the whole note. The failure to pay one installment of interest would be a circumstance of suspicion, the suspicion growing stronger as defaults were made in the payment of successive installments. "Where a note is for the payment of money at a specified time, with interest payable annually, the payment of interest annually is as much a part of the agreement as a promise to pay the principal. It is a portion of the debt, and if, when the note is sold to a third person by the payee, a year's interest is past due, the note is then dishonored. When the instrument furnishes evidence that the written promise to pay has been dishonored, a party taking the same takes it with the warning that the maker may have some defense; and no one can become a bona fide holder of a promissory note so as to shut out a valid defense of the maker, if the holder takes it when money is past due upon it." The above is the language of the Supreme Court of New York in the case of *Newell v. Gregg*, supra, and, in our opinion, expresses the sound rule on the subject. Section 4291 of the Civil Code (1910) immediately follows those sections of the code which declare the rights of bona fide holders of negotiable paper, and was intended unquestionably as a qualification of these rights; and we therefore conclude that the trial judge in the present case properly instructed the jury

that it was a question for them to determine, under the evidence, whether the failure to pay the interest on the note was a circumstance which would place a prudent man upon his guard in purchasing the note; and if they concluded that it was a sufficient circumstance, then the holder of the note would not be a bona fide purchaser, and the maker thereof would be let in to all of the defenses which he would have had to the note, if in the hands of the original payee. If the circumstance of default in the interest due for two years was in the present case sufficient to put the plaintiff, as a prudent man, on his guard in the purchase of this note, then it was also sufficient to put him on inquiry, and he is bound in law and in equity by any knowledge or information that he might have acquired in pursuance of reasonable inquiry on the subject. The jury were authorized to infer from the evidence that upon reasonable inquiry the purchaser of this note would have found out the defenses which the makers had to its payment, to wit, that the consideration of the note had totally failed. There was evidence to establish this defense.

The exceptions other than those indicated above are immaterial. The question which we have discussed is controlling, and, in the view that we have taken of the law, we fail to find any error, and, therefore, affirm the judgment refusing a new trial.

Judgment affirmed.

3560. CITY OF SANDERSVILLE v. STANLEY.

- HILL, C. J. 1. The demurrer was fully met by appropriate amendments, and, as amended, the petition set forth a good cause of action.
2. The act of December 20, 1899 (Civil Code of 1910, § 910), providing that notice of the "time, place, and extent" of injury to persons or property, claimed to have been inflicted by a municipal corporation, shall be given to its officers before suit is brought, is sufficiently complied with where the notice gives information sufficiently definite to locate the property alleged to have been injured, the amount of damages claimed, and sufficient data to enable the city authorities to examine into the alleged injuries and determine whether the claim should be adjusted without suit. In other words, a substantial compliance with the statute is enough, and exactness of description or nicety of pleading is not required. *Smith v. Elberton*, 5 Ga. App. 286 (63 S. E. 48); *Langley v. Augusta*, 118 Ga. 590 (11), (45 S. E. 486, 98 Am. St. R. 133).

3. Where suit is brought against a municipality to recover damages caused to the property of a private citizen by extending through the property an open sewer containing poisonous sewage, and thus destroying to a large extent its value for pasturage, for which purpose a large portion of it was used, testimony tending to show that water impregnated with the sewage passing through the land was so poisoned thereby that stock drinking it were killed, and that the use of the land for pasture had to be abandoned, was admissible in evidence, for the purpose of showing the deterioration in value of the property. *Langley v. Augusta*, supra.
4. No error of law appears, and the evidence supports the verdict.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Sandersville—Judge Jordan. May 26, 1911.

The notice referred to in the decision was as follows:

“State of Georgia, Washington County. To the Mayor and Aldermen of the City of Sandersville: Your petitioner, Mrs. E. M. Stanley, respectfully shows, that she is the owner of a certain tract of land, located about two and one half miles west of Sandersville, Ga., through which a creek runs, and from which her cattle and other stock in her pastures are watered; that along and near said creek she has provided homes for her tenants on her said lands; that the said City of Sandersville, in constructing its sewer, extended it to said creek, and into said creek the said sewer empties all the filth and droppings from the water closets of said city; and, in consequence, in said creek and through petitioner’s land there flows a constant stream of polluted water and all manner of offensive salvage [sewage?] from said town, rendering said water unfit for her cattle and other stock to drink, and thereby injuring and damaging your petitioner in the sum of \$1,500 or other large sum; that said water, having thus become contaminated and offensive from the aforesaid drainage, renders her said land less valuable, on account of rendering the surrounding territory covered by your petitioner’s land, and embraced in which are some of the petitioner’s tenant houses, unhealthy and less desirable on account of sickness to her said tenants resulting therefrom; and all to the injury and damage to your petitioner in the said sum of \$1,500 or other large sum. Wherefore your petitioner prays that the said City of Sandersville pay to her the said \$1,500, or such sum as may be reasonable and just, as compensation to her for the injury and damage

thus sustained, and that said mayor and aldermen so order. This August 12, 1908. [Signed] Mrs. E. M. Stanley."

This notice was admitted in evidence over the defendant's objection that it was no demand as contemplated by law; that it was too vague and indefinite in its terms, and did not set forth with the certainty required by law the time, place, and extent of the injury complained of, and the negligence causing the same.

J. E. Hyman, Evans & Evans, J. J. Harris, for plaintiff in error.

J. S. Adams, W. E. Armistead, Hines & Jordan, contra.

3561. MIZELL LIVE STOCK CO. v. BANKS.

1. The allegations of the plea of fraud set out a good defense.
2. The rule that parol testimony shall not be received to change or add to the terms of a written contract does not apply where the alleged contract was procured by fraud. In such case the contract is not binding upon the party defrauded, and may be rescinded at his instance.
3. There was no error, and the verdict is supported by some evidence.

DECIDED JANUARY 15, 1912.

Attachment; from city court of Douglas—Judge Lankford. June 22, 1911.

Rogers & Heath, for plaintiff.

O'Steen & Wallace, for defendant.

HILL, C. J. 1. This was a suit on a note given for the purchase-price of a horse. The suit commenced by attachment and levy upon the horse. The defendant admitted the execution of the note, and that the plaintiff was the holder thereof. The defense relied upon was fraud by the plaintiff, which entitled the defendant to have the sale rescinded. The plea alleged, that the agent of the plaintiff, who sold the horse to the defendant, represented, at the time of the sale, that the horse was eight years old; that the defendant was ignorant of horses and did not know how to determine their age by inspection or examination, and that when he purchased the horse he relied absolutely on the agent's statement as to its age, and paid \$50 cash and gave to the plaintiff the note sued on; that two or three days thereafter he discovered that the horse was from fifteen to sixteen years of age, the discovery being made through information given to him by a person who had previously owned the horse; that upon this discovery the defendant went at once to the

plaintiff, stated to him that his representation as to the horse's age was untrue, demanded a rescission of the sale, on account of the fraud perpetrated upon him, tendered the horse back, and demanded the return of his \$50. Pending the litigation the horse was sold under a "short order," and was bought by the plaintiff for \$185. The defendant amended his plea and asked for a judgment against the plaintiff, not only for the \$50, but also for the \$185 for which the horse had been sold, claiming title to the horse. The jury found a verdict for the defendant for \$25, and the plaintiff filed a motion for a new trial, which was overruled, and he excepted.

Two controlling questions are made. The others are immaterial. A demurrer, on the ground that the plea set up no defense, but attempted to vary, alter, and contradict the terms of a written contract, was overruled, and exception was taken to this ruling. The purchase-money note contained the following express warranty: "This note is for the purchase-price of one sorrel mare about eight years old, name Hattie. Weight about 1425 pounds. The above-described property is sold without any guarantee as to its kind or quality, and is purchased by the maker of this obligation with the understanding that no warranty shall be implied as against the seller." It is insisted that this excluded the parol warranty that the horse was eight years old at the time of the sale. Even if this contention was true, the plea set up fraud and demanded a rescission for the fraud. It is only in the absence of fraud, accident, or mistake that a written contract which appears to be a complete and certain agreement between the parties will be conclusively presumed to contain all the terms and conditions of the contract, which can not be varied or contradicted by prior or contemporaneous verbal representations or statements. *Bullard v. Brewer*, 118 Ga. 198 (45 S. E. 711); *Fleming v. Satterfield*, 4 Ga. App. 351 (61 S. E. 518). There is quite a difference between an attempt to contradict the terms of a contract by parol testimony under a defense that the contract has been breached, and an effort to have the contract rescinded because of fraud in its procurement. *Pryor v. Ludden*, 134 Ga. 288 (67 S. E. 654). In this case, however, the written contract itself contained the express warranty that the horse was "about eight years old." The whole warranty should be construed together, and if there is an apparent contradiction between this

express warranty as to age, and the latter part of the warranty, which would seem to exclude any warranty as to kind or quality of the horse, and thus render the warranty as a whole ambiguous, it should be so construed as to reconcile all the parts thereof and permit the whole of the warranty to stand; and if this is impossible, it should be construed most strongly against the party who prepared it and in whose favor it was made. Construing all the parts of the warranty together, it means that except as to the fact that the mare was about eight years old, every other express warranty as to its kind or quality was excluded, as well as all implied warranties as to the soundness of the horse, etc. Certainly we can not exclude from this warranty the distinct statement that the horse was about eight years old. This is a material statement, the age of the horse being an important factor as to its value. The plea, therefore, can also be construed to be an attack upon the truth of this express warranty. For both of these reasons we think the judge very properly overruled the demurrer to the plea. The defense set up was a good one, both because it claimed a rescission of the sale, on account of the fraud specifically described, and because it alleged a specific breach of a material express warranty made in the written contract. The ruling on this point not only goes to the demurrer, but includes several of the grounds of the motion for a new trial.

2. The next point relied upon by the plaintiff in error was that the defendant, at the time he purchased the horse and before he signed the note sued upon, not only had full opportunity to examine the horse, but in fact did examine her and discovered the defect set up in his plea; it being contended that the age of the horse was a patent defect, discoverable by inspection, and that he was distinctly told by friends, who at his request examined the horse, that the representation as to her age was not true, but that on the contrary the horse was twelve or fourteen years old; and that notwithstanding these facts and with full knowledge of the falsity of the representation as to the age of the horse, he nevertheless accepted the horse, made a payment of \$50 thereon, and gave the note sued on for the balance of the purchase-money, and this conduct of his amounted to a waiver, although the warranty as to age may have been express. It is contended that where an express warranty is set out, the purchaser is not bound to examine

the property or to exercise any diligence to discover defects; but that if he does in fact examine the property and discover defects, makes no objection thereto, and accepts the property and signs a contract, this amounts to a waiver of the defects, and he is bound by the contract; and that this would be true whether the effort was to rescind the contract for the fraud in the representation, or for damages for the breach of the express warranty. *Equitable Manufacturing Co. v. Biggers*, 121 Ga. 381 (49 S. E. 271); *Miller v. Roberts*, 9 Ga. App. 511 (71 S. E. 927). The defendant endeavored to avoid the effect of any information that he had as to the age of the horse, by evidence that, while it is true he was told by the vendor that the horse was eight years old, and was also told by a friend who had examined the horse before the purchase that she was from twelve to fourteen years old, yet, when he told the plaintiff of this fact, the plaintiff replied that it was not true, and insisted that the horse was eight years old and that he would guarantee such to be her age. We are inclined to think that it was a question for the jury to determine whether the defendant had the right to accept this positive statement and guaranty made by the plaintiff, and rely upon it, rather than rely upon the statement made to him by his friend, especially in view of the fact that the plaintiff (as the evidence shows) was an experienced dealer in horses.

While we have discussed these questions of law made under the evidence, we are impressed with the fact that regardless of them, in the absence of any material error of law, the verdict, which in effect declared a rescission of the sale because of this fraud, was substantially just and fair to both parties. The undisputed evidence shows that the plaintiff sold the horse to the defendant for \$265, \$50 cash, and the balance in the note sued upon. The plaintiff levied his attachment upon the horse for the purchase-money and had it sold under a "short" order of sale, and bought it in for \$185. This would make \$235 that he got for the horse, or \$30 less than the amount that the plaintiff had agreed to pay. Even if we concede that the plaintiff was entitled to a verdict for this \$30, resolving every issue in his favor and standing upon the strict letter of the law, yet when the evidence shows that the horse was in fact at least fourteen years old, and not eight, we think the plaintiff got full value for his property. The jury, in allowing the defendant \$25 by way of recoupment, were probably moved to do

so by this practical, common-sense view of what was right between the parties, and by the additional fact that the defendant should pay for the use of the horse for the time he had used it, and therefore only gave him back half of the cash which he had paid at the time of the sale. The verdict is manifestly substantially right and just, the trial judge approved it, and this court feels that no sufficient reason is shown why another trial should be granted. When substantial justice is reached in any case, litigation should end.

Judgment affirmed.

3562. HARRIS *v.* THE STATE.

RUSSELL, J. The evidence showing that there was more than one occasion within the two years immediately preceding the commission of the alleged crime when the defendant was openly upon the streets of a city in the county in which the crime was alleged to have been committed, and where he could easily have been arrested, and that at other times within the statutory period he was at work near by in the employ of a citizen of the same county, the fact that the defendant so concealed himself as to arrest the bar of the statute of limitations affecting the criminal prosecution was not established, and the prosecution was barred.

Judgment reversed.

DECIDED JANUARY 15, 1912.

Accusation of sale of liquor; from city court of Houston county—
Judge Brunson. June 19, 1911.

R. N. Holtzclaw, for plaintiff in error.

R. E. Brown, solicitor, contra.

3566. HOOKS *v.* WILLIS.

HILL, C. J. The evidence in this case not only fully authorizes the amount of the verdict which the plaintiff recovered, but shows that he was entitled to a larger verdict than the one found in his favor. Some immaterial errors of law occurred during the trial, but these did not affect the merits of the case, and are not of sufficient gravity to warrant another trial. The material questions raised were issues of fact, on which the jury could only have justly found a verdict in favor of the plaintiff. There is no merit in any of the grounds of the motion for a new trial, and the judgment of the lower court must be affirmed.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Leesburg—Judge Long. June 19, 1911.

W. G. Martin, for plaintiff in error. *C. H. Beazley*, contra.

3572. BOWERS, administratrix, *v.* SOUTHERN RAILWAY COMPANY.

1. Under the act of Congress prescribing the liability of carriers by railroad for injuries to their employees, the servant may assume the risk as in other employments, except as to such things as are violative of statutes enacted for the securing of the servant's safety.
2. Where a passenger-train running at somewhat more than the schedule rate of speed was wrecked by reason of the fact that a trespasser turned the switch between the main line and a siding, whereby the train was caused to leave the main line and run into a siding, and was there derailed at a safety switch situated in the side-track at a point about one hundred feet from the main line, and injury to the fireman was caused by the wreck, neither the alleged excessive speed at which the train was running nor the situation of the safety switch is to be regarded as the proximate cause of the plaintiff's injury, especially where it appears from the allegations of the petition and the proof on the trial that the same result probably would have ensued if the train had been running at a normal rate of speed. The proximate cause of the injury is the act of the trespasser.
3. In a suit for damages, if it appears that there intervened between the alleged negligence of the defendant and the damage sustained by the plaintiff the independent criminal act of a third person which was the direct and proximate cause of the damage, the plaintiff can not recover.
4. As to one to whom the railroad company does not owe a higher degree of care than the standard of ordinary care and diligence imposes, and owes no affirmative duty of protection such as it owes passengers, the negligence of the railroad company in leaving a switch unlocked is not to be regarded as the proximate cause of an injury which ensues because a wilful and conscious trespasser, by a criminal act, turns the switch whereby the train is wrecked and a person is injured. The intervening, independent act of the trespasser renders remote the negligence of the railroad company in leaving the switch unlocked.
5. Since the defendant's liability in the present case depends solely upon the question as to whether the switch, through the turning of which the train was wrecked, was turned by the criminal act of a trespasser, alleged error in rulings as to evidence relating to other and independent matters will not be considered, since, even if error were found, it should be treated as harmless.
6. Where evidence is objected to and the court, in response to the objection, states that he does not admit it generally, but admits it for a

special purpose, and counsel for the objecting party, upon ascertaining the purpose for which it is to be admitted, makes no further objection to it, no valid assignment of error can be based on the court's act in admitting it.

7. A witness in this State is not rendered incompetent by conviction of a felony, or other crime, irrespective of whether the conviction be had in this State or in another State, and irrespective of whether the conviction in the State in which it was had carries with it incompetency to testify or not. The competency of witnesses is regulated by the law of the forum.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Atlanta—Judge Reid.
May 10, 1911.

The plaintiff's husband (on whose estate she was administratrix) was killed on an interstate train. He was a fireman of the defendant, engaged in interstate commerce. The plaintiff originally brought suit in two counts under the South Carolina statute, and two counts under the Federal statute; but the court excluded the two counts under the South Carolina statute, upon the ground that the Federal statute applied. The death of the intestate while working as a fireman on an interstate train, administration, earning capacity, number of children, contribution, and other formal parts of the case were proved. It was shown that, at what is known as Gross's siding, where the decedent met his death, there is a switch and side-track running to a factory about a mile and a half away. The track approaches this point on a steep down grade, through a deep cut, and on a curve. The train on which the decedent was engaged at the time of his death approached this point running at the rate of about thirty-five miles per hour (which was slightly above its ordinary speed under the schedule, but not greater than the speed allowed by the rules of the company), and at the switch left the main line, dashed into the side-track, and, at what is known as the safety or derailling switch (i. e., a device placed in a side-track whereby if cars left on the side-track are put in motion they will not run out upon the main line, but will be thrown from the track before the main line is reached), the engine was derailed and turned over, producing the fatality for which the suit is brought. The plaintiff made the following specifications of negligence: (1) Defendant was negligent in that its track was so constructed that the approach to the switch was around a curve and through a deep cut, preventing the engineer and fireman from seeing the lights on the switch-stand and detecting its

condition in time to slow up and avoid running into the same. (2) Defendant was negligent in that it had in the siding, right close to the main-line switch, what is called a safety switch. The effect of a safety switch at this place is that when the switch is thrown, unless the safety is also thrown, the train entering the switch will, instead of going down the side-track, run off, as was done in the present case. (3) Defendant was negligent in that the switch was left unlocked by its employees, leaving it where any passer-by could throw it to the side-track. (4) Defendant was negligent in that its employees working upon its road threw said switch to the side-track instead of to the main line. (5) Defendant was negligent in that the engineer was running at an excessive rate of speed. (6) Ordinary care required the defendant to have and maintain a switch target and switch lights, constructed as follows: A post placed around the curve from the switch, so that the same could be seen at a long distance from the switch; the signals on this post to be connected by wires, so that, when the switch was thrown, the wires would throw the lights by night and the boards by day, indicating to an approaching train whether the switch was thrown to the side-track or to the main line, and giving such indication in time for the train to stop. Defendant failed to have any such target or signals. Such failure on the part of the defendant was negligence. (7) Defendant was negligent in that the rails of the side-track, where the wreck occurred, were small and light, and not sufficiently strong to hold the engine which was wrecked, the same being a very large engine, and the cross-ties were rotten and defective. (8) Defendant was negligent in that the light on the switch-target was not lighted.

The defendant pleaded that as to the acts of negligence alleged, the plaintiff's intestate had assumed the risk; and in this connection the defendant showed that he had been running for above two years over this track at this place in the condition in which it was at the time of the injury (except, of course, in so far as the switch was on this occasion turned to the side-track). The defendant further pleaded that the proximate cause of the injury was an act for which it was in no wise responsible, namely, the act of a trespasser in breaking the lock on the switch and turning it so as to throw the train to the side-track. On this phase of the case the defendant showed, by the evidence of one Clarence Agnew, that the

witness himself had thrown the switch from the main line to the siding shortly before the wreck occurred; that he pulled the chain and the lock came open; that he broke the lock up and threw it away; that he afterwards found the broken pieces of the lock and the piece of iron with which he broke it; that he confessed to his crime; that he was tried for the murder of the engineer, was convicted, and is now in the penitentiary. The defendant then proved by a woman that she saw Agnew at the switch shortly before the wreck, knocking at it. The sheriff of Spartanburg county, South Carolina, testified that Agnew confessed that he broke the lock on the switch, and went with him and found the broken pieces of the lock, and the implements with which he said he broke it. The broken lock, showing indentation marks, and the bar with which the lock was broken, were introduced. The defendant showed by the crew of the train which last used the siding that the switch was properly set to the main line and was locked after it was used, and by the crew of the last train which passed the siding shortly before 6:30 in the afternoon that the switch was set right to the main line.

The trial judge, in his charge to the jury, limited the plaintiff's right of recovery to two grounds: (1) negligence on the part of the defendant's employees in leaving the switch unlocked where any passer-by could throw it to the side-track; and (2) negligence on the part of the defendant's employees in themselves throwing the switch to the side-track, instead of to the main line. The important question in the case is whether the court erred in thus limiting the plaintiff's case.

Burton Smith, for plaintiff.

McDaniel & Black, for defendant.

POWELL, J. (After stating the foregoing facts.)

The case, as has been said already, arises under the act of Congress fixing the liability of interstate railroads for injuries to their employees, and is determinable by its provisions. Under that act the doctrine of respondeat superior applies in favor of an injured servant, and what is known as the "fellow-servant doctrine" is practically abolished. Contributory negligence on the part of the injured servant diminishes, but does not defeat, a recovery. The defense of assumption of risk was not abolished, however, except in cases where the servant was injured through the violation by the master of some "statute enacted for the safety of employees." The

questions of negligence and of proximate cause are still to be determined according to the generally existing rules on that subject. Taking up now the allegations of negligence which the court eliminated from the consideration of the jury, for the purpose of seeing whether the court properly eliminated them: The first is that the defendant was negligent in that it had so constructed its track that the approach to the switch was around a curve and through a deep cut, which prevented the engineer and fireman from seeing the lights on the switch-stand, in order to detect that the switch was turned and to slow up and keep from running into the side-track. The decedent had been running over this same track for more than two years. It seems plain to us that as to this he had assumed the risk.

The second allegation of negligence is that the derailing switch, or safety switch as it is called, on the side-track, was located so close to the main line that when the train left the main-line track it was thrown off, whereas otherwise it would have continued down the side-track. If it can not be said that this was also an assumed risk, still we think that under all the facts disclosed there was no negligence on the carrier's part. The location of this derailing switch was a condition, and not a cause, of the injury. It was certainly proper for the company to have this derailing switch in the side-track, in order to protect its main line from cars left on the side-track. It was not located so close to the main line as to interfere in any wise with the operation of trains thereon, unless some act of wrong on the railroad company's part or on an outsider's part had changed the switch. But for some such thing, the train on which the plaintiff's husband was working would never have entered this side-track at all, so as to be in range of this derailing switch, and, therefore, when we come to consider its part in bringing about the death of the decedent, we are first confronted with the question as to what was the cause of the decedent's being in range of this switch at the time he was killed; and, on looking to the cause, we find that it was the wrongful act of some one in turning that switch. As we attempted to point out in *Atlantic Coast Line Railroad Co. v. Daniel*, 8 Ga. App. 775 (70 S. E. 203), the law regards as the proximate cause that thing or combination of things in which, or through which, the normal course of prudently conducted affairs is violated. In a remote sense, the location of

this derailing switch (if its location could have been in any sense regarded as wrongful) may be regarded as a cause of the injury, but the proximate cause was the wrongful turning of the switch between the main line and the side-track. The court submitted to the jury the question as to whether the defendant was guilty of any wrong or neglect as to this switch between the main line and the side-track being turned; and the jury, having found that it was guilty of no wrong or negligence in this respect, could not have found that it was guilty of actionable wrong merely because this derailing switch was situated at the particular point at which it was, rather than at some other point in the side-track. There may be concurrent proximate causes, of course, but the distinction must always be kept in mind between concurrent causes and mere conditions upon which the proximate cause operates.

The speed at which the train was running was likewise either a condition or a remote cause. There was nothing inherently wrongful in this rate of speed; it was ineffectual to produce any injury. The real cause of the train's speed becoming dangerous was the turning of the switch (as the jury has found) by the trespasser. According to every rule of human experience, the wreck would have resulted just as it did if the train had been running at the schedule speed of thirty miles an hour instead of thirty-five or forty, as it was running. It is impossible to see how it can be seriously contended that the injury was brought about in any wise through any excess of speed over the normal, even if we regard the absolute schedule of the train as the normal, and regard thirty-five or forty miles an hour as an abnormal rate. We are not to be understood as holding that any excessive rate of speed was shown in this case, but are merely attempting to show that if an excessive rate of speed was shown, the wreck and the injury did not result from that cause.

As to the allegation of negligence to the effect that the defendant did not equip its switches at this point with what is known as distance signals (a description of the operation of which is set forth in the excerpt quoted above from the plaintiff's petition): it was shown that nowhere on the defendant's lines were any such switches, and that the plaintiff's husband had been working on that road as a fireman and going over the very track in question for more than

two years. The court properly held that even if this were a negligent deficiency, the decedent had assumed the risk.

The allegation of negligence as to the condition of the rails and ties on the side-track was probably so far rebutted by the proof as not to make it a jury question; but irrespective of that, these things stand on the same footing juridically as does the situation of the derailing switch which has already been discussed in detail. We conclude, in charging the jury, that the court did not err in submitting only the two questions: (1) as to whether some employee of the company left this switch open, or whether it was opened by a trespasser; and (2) whether the company's employees were negligent in leaving it unlocked so that a trespasser might open it. As to the submitting of the second question to the jury (that is, as to the company's negligence in leaving the switch unlocked) it may be remarked that the court probably gave the plaintiff a benefit to which he was not entitled. As to persons to whom the railroad company owes the duty of extraordinary care and diligence, or the duty of affirmative protection (such as passengers), it may be and probably is true that a railroad company could be held liable for leaving a switch unlocked, whereby a trespasser was enabled to throw a switch and wreck a train; but as to other persons, we doubt if in such a case liability can be upheld. "The defendant's negligence may put temptation in the way of another person to commit a wrongful act, by which the plaintiff is injured; and yet the defendant's negligence may be in no sense a cause of the injury." 1 Sherman & Redfield on Negligence (5th ed.), § 25, quoted approvingly in *Andrews v. Kinsel*, 114 Ga. 390 (40 S. E. 300, 88 Am. St. R. 25). The general doctrine is laid down, in the course of the opinion in that case (*Andrews v. Kinsel*, supra), that where there has intervened between the alleged negligence of the defendant and the damages sustained by the plaintiff an independent illegal act of a third person, producing the injury, and without which it would not have happened, and which is the direct proximate cause of the damage, no liability exists. We have adverted to this doctrine more especially as the basis for saying that in this case the one fact upon which the whole question of liability turns is whether this train was wrecked through the criminal act of a wilful, conscious trespasser who turned the switch, or from some other cause. This question

was squarely submitted to the jury, without any error in the charge as to it; and the only exception as to testimony bearing on this point of the case is, as we shall presently show, not well taken. If this point was correctly presented to the jury and decided by them, the judgment refusing a new trial should not be reversed, irrespective of whether the numerous exceptions to rulings on evidence relating to other phases of the case are well taken or not; for if error as to any of these matters be established, it would at once fall into the category of harmless error.

Two rulings on evidence, relating to the issue of fact as to whether the alleged trespasser, Clarence Agnew, threw this switch or not, are complained of. The first is that the court, on the direct examination of John M. Nichols, the sheriff of the county where the wreck occurred, was allowed to answer that when he arrested the defendant, he carried him up to the scene of the wreck and "went up to the switch where he claimed to have broken the lock loose." Upon objection generally to this testimony, the court made the following statement: "I think anything he stated which caused the sheriff to make the search is admissible. I will leave it in for the present—anything that was said to him about finding those things. I understand you are objecting to all of it. This evidence don't go in as evidence of the truth of the statement he made that he did this thing. It goes in connection with the conduct of these people in finding those things." Thereupon, Mr. Smith, of counsel for the plaintiff, replied, "Your honor does not admit it to show he broke the lock on the switch?" The court answered, "No;" whereupon no further objection to the testimony was interposed. This, of course, presents no ground for assignment of error in this court, even if the ruling of the court were incorrect; but the court's ruling was not incorrect.

The other assignment of error is that the court erred in admitting the testimony of Clarence Agnew, it appearing to the court that Agnew was at the time a convict for life, and that under the laws of South Carolina, where he was convicted, he was incompetent to testify as a witness. Able counsel for the plaintiff in error frankly concedes in his brief that personally he does not regard this exception as being well taken, but adds: "But, as counsel frequently make mistakes, if we are mistaken, we wish the benefit of

it." The opinion of counsel as to this matter is eminently correct; his objection was not well taken. Under the law of this State a person convicted of a felony is a competent witness; the fact of his conviction only goes to his credit. Civil Code (1910), § 5858. Of course, the competency is determined by the law of the forum.

Judgment affirmed.

3573. JONES *v.* O'PRY *et al.*

HILL, C. J. No error of law is complained of, and, the question made by the record being only an issue of fact, on which the evidence was sufficient to support the verdict, there was no error in overruling the motion for a new trial.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Levy and claim; from city court of Jeffersonville—Judge Shannon. May 24, 1911.

J. D. Shannon, L. D. Moore, for plaintiff in error.

H. T. Griffin, R. A. Harrison, contra.

3587. MOORE *v.* KENDALL.

HILL, C. J. The presumption of ownership arising from the recital made by the levying officer in the entry of the levy, that the property levied upon was in the possession of the defendant in *fi. fa.* at the time of the levy, was fully rebutted by the undisputed evidence in behalf of the claimant. The verdict in the justice's court finding the property subject was contrary to law, because it was without any evidence to support it, and in direct conflict with the undisputed evidence. The certiorari by the claimant should have been sustained by the judge of the superior court.

Judgment reversed.

DECIDED JANUARY 15, 1912.

Certiorari; from Paulding superior court—Judge Edwards. April 27, 1911.

C. D. McGregor, for plaintiff in error. *F. M. Richards*, contra.

3589. HIGDON *v.* WILLIAMSON.

1. In this State a judgment on a suit against a partnership binds all partners, so far as the partnership is concerned, and also binds individually such of the partners as are served. The execution issued on the judgment may be levied either on partnership property or on individual property of the partners served. If all the partners are served, the judgment stands just as an ordinary judgment against joint debtors would stand, except that the partnership assets are also subject to levy under the execution issued thereon.
2. The right given by the Code of Georgia to one joint defendant in execution, paying off the execution, to control the judgment and execution against his codefendants for the purpose of compelling contribution, by having the fact of payment entered thereon by the collecting officer, applies to judgments against partners, based on service upon all of them.
3. A justice of the peace is a collecting officer as to debts sued in his court, and may make, upon an execution issued from his court against joint defendants, the entry of payment by one of them, which is required in order that the paying defendant may control the judgment against the others.
4. No judgment will be reversed for mere harmless error.

DECIDED JANUARY 15, 1912.

Certiorari; from Fannin superior court—Judge Morris. June 9, 1911.

A judgment against Higdon & Williamson, a partnership, was rendered in a justice's court. After execution was issued, Williamson, one of the partners, paid off the debt; and the justice of the peace who had issued the execution entered thereon a recital of the fact of Williamson's having made the payment, and thereupon transferred the execution to him. Williamson then caused the execution to be levied on certain property of Higdon's, whereupon Higdon filed an affidavit of illegality, the substantial points raised by it being that the execution could not lawfully be levied on his individual property, since there was in existence sufficient partnership property to pay off the debt, and that the payment made by Williamson operated to satisfy the judgment and discharge its lien. At the trial before the magistrate Williamson moved to strike the affidavit of illegality, as being insufficient in law, and the magistrate overruled the motion. Higdon then moved to dismiss the levy, because it appeared that Williamson, one of the defendants, had paid the judgment, and that the justice of the peace who made the entry transferring the judgment to him had no authority to do it, it being contended that a justice of the peace is not a collecting

officer; and the magistrate sustained this motion. Williamson obtained certiorari. While the matter was thus pending in the superior court, counsel for Williamson filed a writing in which they stated that they credited the execution with half of the amount due under it, and claimed against Higdon only the other half. Upon this being done, the court sustained the certiorari and granted a new trial. To this judgment, as well as to the action of the court in allowing counsel for Williamson to file the paper crediting the execution with half of the amount due under it, Higdon brings error.

A. S. J. Hall, for plaintiff in error.

William Butt, T. A. Brown, contra.

POWELL, J. (After stating the foregoing facts.)

1. In this State a judgment against partners binds the partnership and such of the individual partners as are served; and the execution that issues upon it authorizes levy upon the property of the partnership or upon the individual property of such of the partners as are served, to the same extent as if they were ordinary joint defendants. Civil Code (1910), § 5592. The rationale is that the law does not look upon the partnership as a completely distinct and separate legal entity, but as somewhat so; the partners, as to partnership debts, are joint contractors; and each is the agent of the other to a limited extent. When suit is brought for a debt due by the partnership, the plaintiff may hold the individual partners liable by serving them. If there be two partners, and one is served and the other is not, the judgment stands as any other personal judgment, so far as concerns him who is served; as to the other partner the service, and consequently the judgment, is only partially binding; that is to say, it is binding only so far as the partner served is the agent of the partner unserved, and that is only so far as concerns the property devoted to the purposes of the partnership. If both partners are served, the judgment is a personal judgment against each and both of them, and the execution thereon may be levied upon either partnership or individual property. In the case at bar there is no contention that both partners were not served; hence, the judgment stands just as if they were ordinary joint debtors.

2. It is provided by the Civil Code (1910), § 5971, that, "When judgments have been obtained against several persons and one or

more of them has paid more than his just proportion of the same, he or they may, by having such payment entered on the fi. fa. issued to enforce said judgment, have full power to control and use said fi. fa. as securities in fi. fa. control the same against principals or cosecurities, and shall not be compelled, as heretofore, to sue the codebtors for the excess of payment on such judgment." The language, "power to control and use said fi. fa. as securities in fi. fa. control the same against principals or cosecurities," has reference to the Civil Code (1910), § 3558, which provides that any person standing in the relation of surety who shall have paid off or discharged a judgment against himself and others may "have the fact of such payment by him entered on the execution by the plaintiff or his attorney or the collecting officer," and thereupon shall have the right to control the execution and judgment against the other defendants, to the same extent as if he were the plaintiff therein, so far as is necessary to his just reimbursement.

The language of section 5971, *supra*, seems fully broad enough to include the case where one partner has paid off a judgment binding personally on himself and a copartner. Indeed, this section, taken in connection with the other section to which it refers (§ 3558), would seem to give to the partner paying off the judgment the right to enforce it to its full amount against the partnership assets; though there may be something growing out of the general rule that a partner can not sue the partnership except in equity (see *Paulk v. Creech*, 8 Ga. App. 738, and citations, 70 S. E. 145), which would forbid his having direct recourse at law upon the partnership assets. As between the two partners themselves, the rendition of the judgment subjecting each and both of them to individual liability takes the transaction out of the partnership relation to such an extent as to make it one of those exceptions referred to in the *Paulk* case, *supra*, wherein one partner may proceed at law against the other. In *Neel v. Morris*, 73 Ga. 406, it is held that equity has jurisdiction to compel contribution in a case such as the one at bar. Undoubtedly this is true; but, in our opinion, that jurisdiction is concurrent, and not exclusive. In the *Neel* case, *supra*, it was stated that some members of the court leaned to the view that the statute now contained in the Civil Code (1910), § 5971, does not apply to executions issued upon judgments against copartners. However, no decision of the question was made. As intimated above, there may

be reasons for refusing an application of the statute to cases where only one of the partners is served; but we see no reason why it is not applicable to cases like this, where both partners have been served and have become jointly and individually bound by the judgment. The affidavit of illegality presented no defense and should have been stricken. Upon like reasoning, it follows also that the magistrate erred in dismissing the levy, so far as his ruling was based on the proposition that payment by one of the partners operated to discharge the judgment in toto.

3. As to the point that the magistrate was not such a collecting officer as could receive payment and make the entry required by the code, in order to give the paying defendant control of the *fi. fa.* against the other defendant, it is necessary only to refer to the case of *Bryan v. Meaders*, 9 *Ga. App.* 326 (71 S. E. 491), where it was held (with a citation of the authorities) that as to debts sued in justice's courts, the magistrate is a collecting officer.

4. The exception that the court allowed the plaintiff to file a writing while the certiorari was pending in the superior court, whereby he disclaimed any right to collect from his partner more than half the amount due on the execution, amounts to nothing. From a technical standpoint the court should not have considered the paper, as the judge, on the hearing of the certiorari, has no right to consider aliunde matters or to allow additions or amendments to the pleadings or the proof, but since this writing which was filed declared no more than the law recognized as being the legal status in its absence, and since the judgment sustaining the certiorari was absolutely correct, this error was harmless.

Judgment affirmed.

3590. HALL *v.* ROEHR & Co.

HALL, C. J. 1. Under the mandatory provisions of the constitution of this State—article 6, section 16 (Civil Code of 1910, § 6543)—the venue of all civil cases is in the county where the defendant resides, except in certain cases specified in paragraphs 1 to 5 (inclusive) of the said article. A trover suit is a civil case, and is not among the exceptions to the general rule. Where, therefore, a timely and sufficient plea to the jurisdiction of the court was filed, on the ground that the defendant was not a resident of the county in which the suit was

brought, it was error for the trial judge to strike this plea, and the issue therein made should have been submitted to the jury.

2. The giving of a bond for the forthcoming of the property in a trover suit, where bail is required, is in a *sensu* an appearance by the defendant, yet it is not such appearance and pleading to the merits of the case as would constitute a waiver of jurisdiction. To complete such waiver there must not only be a general appearance, but also pleading to the merits. Civil Code (1910), § 5664.

Judgment reversed.

DECIDED JANUARY 15, 1912.

Trover; from city court of Bainbridge—W. V. Custer, judge pro hac vice. June 22, 1911.

E. S. Longley, for plaintiff in error.

J. C. Hale, W. H. Krause, contra.

3592. FLETCHER GUANO CO. *et al.* v. VORUS.

The special lien of a landlord for supplies furnished to make the crop exists only against the particular crop which the supplies were furnished to make; but where the landlord at the beginning of a year advances to his tenant corn and similar products, and at the end of the year the tenant has on the place an adequacy of like products with which to repay the advancement, but needs them in order to make the next year's crop (the relation of landlord and tenant continuing for another year), and it is agreed between the landlord and the tenant that the latter, instead of delivering the products to the landlord, shall keep them and use them to make the second year's crop, and the tenant does so, the landlord has a lien as to them upon that year's crop.

DECIDED JANUARY 15, 1912.

Money-rule; from city court of Lumpkin—Judge Hickey. June 26, 1911.

G. Y. Harrell, for plaintiffs in error. *T. T. James*, contra.

POWELL, J. The case arises on money-rule to determine the rank and validity of certain liens claimed by various creditors upon the proceeds arising from judicial sale of the crops raised in the year 1910 by a tenant upon a plantation of Miss Vorus, the defendant in error. The case, as presented in this court, narrows to a single question: Did Miss Vorus have a valid landlord's lien for supplies? The facts are as follows: At the beginning of the year 1909, she furnished to this tenant corn, fodder, cottonseed, and cane, as crop supplies for that year. These articles were consumed, of course, during the year, but at the end of the year the tenant had

enough corn, etc., to have replaced them. However, he was to remain on the place as a tenant for the year 1910, and would need these articles to make that year's crop. So it was agreed that he should keep them and repay out of his crop for 1910. For these things Miss Vorus claims the landlord's lien, and the other creditors say that she has no lien as to them, because the supplies were furnished for the crop of 1909, and not for the crop of 1910.

The ordinary rule among creditors is that equality is equity. Hence, laws giving special liens are strictly construed; and the person claiming a special lien must show that he is plainly within the law under which he asserts it. Nevertheless, common sense must prevail as to this, as well as in regard to other propositions of law and of equity. The law gives a landlord a special lien on the crops of his tenant for such necessities as the landlord may furnish in order to make that crop. Back debts due from the tenant to the landlord can not, by any agreement between the parties, be counted as advances to make any new crop. No tacking is to be allowed; no estoppel can raise the lien. *Parks v. Simpson*, 124 Ga. 523 (52 S. E. 616). Cf. *Fountain v. Fountain*, 7 Ga. App. 361 (66 S. E. 1020). And under the decision in *Parks v. Simpson*, supra, if the tenant at the end of the year 1909 had simply said to his landlord, "I can pay you now, but let the indebtedness go over, to be paid out of next year's crop," and the landlord had acquiesced, no lien would have arisen. But law and common sense both differentiate that case from the case at bar. In this case the corn, etc., furnished the tenant in 1909 were to be repaid in kind (though, perhaps, that makes no great difference), and at the end of the year there was in the crib and other places of storage, ready to be delivered, if called for, more than enough corn, etc., to make the repayment. The landlord's agent went to the place to arrange this matter and to make contracts for the coming year. The rent for the year 1910 was agreed on. The landlord's agent said to the tenant, "I suppose you will need that corn, fodder, hay, cottonseed, and sugar cane in making another crop." The tenant replied in the affirmative. The agent then told him to go ahead and use it and to repay it out of the 1910 crop. This transaction amounted to constructive delivery of the corn, etc., from the tenant to the landlord, and redelivery from the landlord to the tenant. If there had not been enough of these articles on hand to repay the

landlord, the case would be entirely different. There could be no constructive delivery of a shortage; nor could there be a delivery of supplies to make the 1910 crop, by construction or otherwise, through counting a failure to pay for 1909 supplies, or the debt arising from the failure to pay as if it were supplies for 1910. But here the supplies, the things necessary to make the 1910 crop, were on hand at the very place where the tenant could most expediently use them. It was not necessary, in order to satisfy the law and to create a lien, that the tenant should put the corn out of the crib, move the fodder stack, tear up the cane bed, and go through some form of trying to put them into the landlord's hands, and then have the landlord turn them back into his hands, whereupon he would have to put the corn back into the crib, move the fodder stack back, and bed the cane again. This would be nonsense. People would laugh at the law if it required any such thing. The law recognizes constructive delivery in such cases, just as people do. The trial judge held correctly.

Judgment affirmed.

3593. LACKEY v. OLD KENTUCKY MANUFACTURING CO.

HILL, C. J. 1. In a suit on an account, in a justice's court, where the account was verified by the affidavit of the plaintiff, and a counter-affidavit was filed by the defendant, while the justice was not authorized to enter a judgment in favor of the plaintiff on his verification of the account without other proof, yet it was harmless error to admit the affidavit of verification in evidence, where, in addition to the affidavit, other proof was submitted in support of the correctness of the account, which was sufficient for that purpose irrespective of the affidavit. Civil Code (1910), § 4730.

2. This case involves only \$12. There was evidence to support the finding of the jury in the justice's court in favor of the plaintiff, and no material error of law appears. The judgment of the superior court, overruling the certiorari, will not be disturbed.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Certiorari; from Paulding superior court—Judge Edwards.
April 27, 1911.

C. D. McGregor, for plaintiff in error. F. M. Richards, contra.

3594. HANDLEY v. MERCHANTS & FARMERS BANK.

HILL, C. J. This was a claim case, in which the wife of the defendant in *fi. fa.* was the claimant. When the case was called for trial a motion was made to continue, because of the claimant's absence on account of illness. The showing in support of the motion was the testimony of the husband and an unsworn statement of a physician. The case had been previously continued two or three times on account of the absence of the same witness, and it also appeared that her interrogatories could have been taken in the exercise of proper diligence. *Held*, that the trial judge did not abuse his legal discretion in overruling the motion.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Levy and claim; from city court of Eastman—Judge Griffin.
May 20, 1911.

Oscar J. Franklin, for plaintiff in error.

J. H. Roberts, contra.

3596. BEASLEY, COUCH & Co. v. ROGERS & RAWLINS.

POWELL, J. No error of law is complained of; the evidence is in conflict, and the jury's solution of that conflict is binding on this court.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Eastman—Judge Griffin. 'May
31, 1911.

R. L. J. Smith & Son, Roberts & Smith, for plaintiffs in error.

W. M. Clements, contra.

3597. CHANDLER-BLACKSTAD MERCANTILE Co. v. PRICE & Co.

HILL, C. J. 1. Testimony that one party to a contract was induced to sign it by false statements as to its contents, and that he was prevented from reading the contents before signing, by the artifice and trick of another (fully stating in what the trick or artifice consisted), did not conflict with the elementary rule that parol testimony is not admissible to vary or alter the terms of a written contract, and was properly admitted in evidence in support of the plea of fraud in procuring the contract. *Marietta Fertilizer Co. v. Beckwith*, 4 Ga. App. 245, and citations (61 S. E. 149); *Truitt-Silvey Hat Co. v. Callaway*, 130 Ga. 637 (61 S. E. 481).

2. No error appears, and the evidence supports the verdict.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Action on contract; from city court of Eastman—Judge Griffin.
May 6, 1911.

C. W. Atwill, for plaintiff. *J. A. Neese*, for defendant.

3849. DAVIS *v.* CITY OF WAYCROSS.

HILL, C. J. Attacks upon the constitutionality of a statute because "the title to the act contains two distinct and separate subject-matters," and because "the body of the act contains matter variant from what is expressed in the title thereof," without more explicit specification, are too general, vague, and indefinite to raise any question for certification to the Supreme Court. The "two distinct and separate subject-matters," and the matter in the body of the act, "variant from what is expressed in the title," should be specifically pointed out. *Parker-Hensel Engineering Co. v. Schuler*, 7 Ga. App. 396 (66 S. E. 1038), and citations. *Judgment affirmed.*

DECIDED JANUARY 15, 1912.

Certiorari; from Ware superior court—Judge Parker. October 2, 1911.

John S. Walker, for plaintiff in error.

Wilson, Bennett & Lambdin, contra.

3601. MOORE *v.* CITY OF WINDER.

The constitution of this State gives to the superior courts the power to review by certiorari the judgments of all inferior judicatories, including municipal police courts; and a general statutory scheme regulating the procedure by certiorari has been provided; but no specific provision has been made as to the review of judgments of police courts in cities the territorial limits of which extend into two or more counties. In such cases a person convicted in the police court has the right of certiorari established in his favor, and the fact that the legislature has not made the remedy specific and definite will not operate in derogation of this right. Therefore, wherever the legislature creates a municipality out of territory located in more than one county, and does not make any provision as to which of the superior courts of the respective counties involved shall have jurisdiction for the purpose of review by certiorari of a conviction in the police court of the municipality, a petition for certiorari may be brought to the superior court of any of the counties in which the municipality is located; and it is error to dismiss the petition on the ground that it was not brought to the superior court of the particular county in which the officer presiding in the

police court happened to sit at the time he tried the case to be reviewed.

DECIDED JANUARY 15, 1912.

Certiorari; from Gwinnett superior court—Judge Brand. June 17, 1911.

Lewis C. Russell, for plaintiff in error. *G. A. Johns*, contra.

POWELL, J. The corporate limits of the City of Winder include parts of three counties, Walton, Gwinnett, and Jackson. The plaintiff in error was convicted in the police court of that city, and sought certiorari. The petition was addressed to the judge of the superior court of Gwinnett county, and was filed in the office of the clerk of that court. It appears, from the testimony in the record, that the municipal offense of which the plaintiff in error was convicted was committed in that portion of the city which lies in Gwinnett county; it also appears that the police court sat for the trial of the case in that portion of the city which lies in Jackson county. The charter of the city makes no provision as to where the police court shall sit, or where the principal office, so to speak, of the municipality shall be, or as to what court shall have jurisdiction for the purpose of suits against the city, or for the purpose of reviewing proceedings had in the municipal court. When the certiorari came on for hearing, the judge of the superior court dismissed it, on the ground that it had been brought in the wrong county; that it should have been brought in the county of Jackson, in which the police court sat at the time of the trial which the petition for certiorari was brought to review.

This presents a situation without a precedent. There are in this State a number of municipalities with territorial limits located in two or more counties, and in some cases (e. g. Arlington, in Calhoun and Early counties) lying in two different judicial circuits, but, so far as we can find, the point here presented has never previously been before any court for decision. There is no statute specially covering such cases. The question is to be determined entirely by general principles of law, and by the application of statutes which do not have this particular case especially within their purview.

Article 6, section 4, paragraph 5 of the constitution of Georgia (Civil Code (1910), § 6514) confers upon the superior courts of this State the "power to correct errors in inferior judicatories, by writ of certiorari," and there is a general statutory scheme set forth in the Civil Code (1910), §§ 5180 et seq., regulating and pre-

scribing the procedure by certiorari. It has been held that this right of reviewing judgments of inferior judicatories by certiorari, being constitutionally given, can not be taken away from the superior courts by the General Assembly, either by direct enactment to that effect or by omission to provide for it in special cases; and even where another method of review is provided, it is cumulative only and does not exclude the right of certiorari. *Hayden v. State*, 69 Ga. 731; *Maxwell v. Tumlin*, 79 Ga. 570 (4 S. E. 85).

The maxim of the common law, "ubi jus ibi remedium" (there is no wrong without a remedy), may originally have been a platitude, a mere boast as to the scope and adequacy of the particular writs and remedies that had been provided, but when this maxim was given not only a more beneficent construction, but also new life and broader scope, by the statute of Westminster II (13 Edw. 1, ch. 24), which required that a writ should be framed to enforce each new right as it might arise, though there might be no precedent, it became a fundamental legal principle of English law, in effect declaring that no man should be deprived of any legal right which was given him, because of any failure to provide a remedy to meet its particular circumstances. We have placed this principle in our code in the following language: "For every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other." Civil Code (1910), § 5506. There is another legal maxim, "quod remedio destituitur ipsa re valet si culpa absit" (that which is without remedy avails of itself, if there be no fault in the party seeking to enforce it). "The benignity of the law is such," observed Lord Bacon, "that, when, to preserve the principles and grounds of law, it deprives a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse; for if it disable him to pursue his action, or to make his claim, sometimes it will give him the thing itself by operation of law, without any act of his own; sometimes it will give him a more beneficial remedy." Broom's Legal Maxims (7th ed.), 171. This principle has not been specifically codified in this State, but it is nevertheless a part of our law. It has never been given specific application to just such a case as this, and we do not mean to say that by its terms it covers this case, but reference has been had to it as showing that lack of a previously formulated remedy never diminishes an established right, or the ability of the

courts to enforce it, or to give such redress as is appropriate; that the man for whom a particular remedy has not been framed may be in even a better position than ordinarily, so far as what may be called flexibility or choice of remedy is concerned.

Now, here is a case in which the right of certiorari from this municipal court is thoroughly established, is even constitutionally given. The general provisions of the law relating to the form of remedy and modes of procedure by certiorari have made no particular provision for the enforcement of the right. As to those municipalities whose police courts have jurisdiction to try for municipal offenses throughout territorial limits of a city or town lying in more than one county, there is no provision as to where the certiorari shall be filed. The right to apply for and to file the certiorari must nevertheless be recognized and enforced; and the failure of the legislature to provide for the particular case must not diminish the right of the applicant.

In the argument of counsel for the respective sides of the case, two conflicting theories have been presented. Counsel for the petitioner in certiorari addressed his petition to the superior court of Gwinnett county (and filed it in that county), on the theory that since the municipal offense was shown by the proof to have been committed in that county, the review proceedings should also be filed there. He argued also that since the constitution of this State fixes the venue for the prosecution of crimes in the county where the crime is committed, analogy would fix the jurisdiction in cases such as this in the county where the proof shows the municipal offense to have been committed. It must be remembered, however, that these municipal offenses are not crimes within the purview of the constitutional provision. *Loeb v. Jennings*, 133 Ga. 796 (67 S. E. 101); *Pearson v. Wimbish*, 124 Ga. 701 (52 S. E. 751). Besides, to lay down the rule that the proceedings to obtain certiorari from police courts located in municipalities, where the territorial limits extend over more than one county, must be brought in the county where the alleged offense was shown by the proof to have been committed would at once be subject to the objection that a large class of cases would still be left unprovided for. An examination of the reports of this court and of the Supreme Court will show that perhaps no ground of certiorari is more frequent than that the proof failed to locate the place where the alleged offense was

committed; and if the rule contended for were adopted, it would follow that in cases where the proof failed to show venue, no petition for certiorari could be brought.

Counsel for the defendant in certiorari present the view (and the judge of the superior court acted upon this theory) that the superior court of the county in which the police court happened to sit has exclusive jurisdiction. This seems more tenable, but still is not satisfactory. No statutory provision so regulates the procedure. Generally appellate proceedings are to be filed not in the county where the judicial officer who rendered the judgment may have happened to be presiding at the time he rendered his judgment, but in the county where the court of judicatory is located in contemplation of the law. For example, a judge of the superior court may lawfully hear and decide in Fulton county a petition for injunction, a motion for a new trial, or any similar matter not involving the use of a jury, though the matter is a court proceeding of another county, say Chatham; and in that event a bill of exceptions filed to review his judgment should be filed not in the county where the judge physically sat and rendered judgment, but in the county where the court of which he was acting as the judicial officer is located by law. This point was decided long ago. See *Rowell v. Neves*, 21 Ga. 125. In that case a demurrer to a petition filed in Baker superior court was heard by Judge Perkins at Albany, in Dougherty county. The bill of exceptions to his judgment on the demurrer was filed in Dougherty county. The Supreme Court dismissed the case, holding that the record should have come through the office of the clerk of Baker superior court. Other examples may be given to show that the place where the judge whose decision is to be reviewed physically sits does not govern in the bringing of review proceedings. If Judge Crosland, judge of the city court of Albany, should be presiding for Judge Harrell in the city court of Bainbridge, but should actually render his decision in his home in Albany, and the losing party should decide to obtain certiorari, of course he would file his petition in the superior court of the county of Decatur, in which Bainbridge is located.

Now, if the charter of the City of Winder had fixed the place of holding the municipal court in one of the counties in which the municipality is located, it might be that the superior court of that county would alone have jurisdiction; but as has been said, the

charter is silent on this subject. It seems to us that the right of certiorari in cases such as this would be unduly abridged if we confined the jurisdiction of review to any one of the counties in which the municipality is located, unless the legislature first makes the matter certain by specifying one of the counties. We therefore hold that certiorari proceedings brought to review judgments of the police court of Winder may be brought to the superior court of any one of the three counties in which the city is located. Consequently, we hold that the judge erred in dismissing the certiorari on the ground that it was brought in the county of Gwinnett and not in the county of Jackson, where the police court sat.

Judgment reversed.

3616. ATKINSON, receiver, v. HARDAWAY.

- POWELL, J.** 1. Where, on the day fixed for the hearing of a motion for a new trial, a brief of the evidence is presented and approved, and the judge takes the matter under advisement and holds it under consideration for a number of days, and, while considering it, discovers that the brief of the evidence is incorrect, he may cause the correction to be made before he acts on the motion, notwithstanding all of this occurs in vacation. Cf. *Atlanta & Birmingham Air-Line Ry. v. McManus*, 1 Ga. App. 302 (1), (58 S. E. 258).
2. Lack of administration upon the estate of a decedent is adequately shown where there appears in the record the testimony of a witness that he had examined the records in the office of the ordinary in the county where the decedent resided at the time of his death, and that no administration had been granted. The law presumes intestacy until proof of a will is made. *Miller v. Speight*, 61 Ga. 460. Hence, lack of representation on a decedent's estate is prima facie shown by proof that no administrator has been appointed thereon.
3. The venue of a cause of action against a railway company for a negligent homicide is in the county in which the fatal injury was inflicted, and not in the county where the injured person afterwards may have died. The cause of action inheres in the wrong as consummated by the injury, and not in the death itself.
4. Under the "employer's liability act" of 1909 (Civil Code of 1910, §§ 2782 et seq.), where suit is brought for the death of an employee, the railway company has the burden of proving that its agents and employees have exercised all ordinary and reasonable care and diligence; and the plaintiff makes a prima facie case by merely showing that the decedent met his death while discharging the duties of his employment.
5. The attempt of the plaintiff in error to make an attack upon the act of 1909, for unconstitutionality, is ineffectual, because of the general and indefinite manner in which he presents the constitutional question.

As to this point, the decision in *Davis v. City of Waycross*, ante, 384 (73 S. E. 556), and the case therein cited, are controlling.

6. Where a statute of this State is applicable to the cause of action set forth in the petition, the plaintiff does not have to plead it in order to get the benefit of it.
7. The measure of damages for a negligent homicide falling within the purview of the act of 1909 (Civil Code of 1910, § 2782) is the "full value of the life of the deceased," which, by reference to section 4425 of the Civil Code, is amplified to mean "the full value of the life of the deceased without deduction for necessary or other personal expenses of the deceased had he lived."
8. The evidence authorized the verdict. The grounds of the motion for a new trial based on the alleged newly discovered evidence, so far as formally complete, present matters merely cumulative or impeaching; and no reason appears for disturbing the recovery in the plaintiff's favor.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Baxley—Judge Sellers.
May 20, 1911.

Bolling Whitfield, J. B. Moore, for plaintiff in error.

Waygood & Cutts, Wade H. Watson, contra.

3617. *SIMS v. WILLER MANUFACTURING CO.*

HILL, C. J. No error appears, and the evidence demanded the verdict rendered for the plaintiff. *Judgment affirmed.*

DECIDED JANUARY 15, 1912.

Complaint; from city court of Valdosta—Judge Cranford. July 7, 1911.

Whitaker & Dukes, for plaintiff in error.

Denmark & Griffin, contra.

3630. *MONK-SLOAN SUPPLY COMPANY et al. v. QUITMAN OIL COMPANY.*

1. Verdicts are not to be set aside for indefiniteness, if they are capable of being reduced to reasonable certainty by an application of the ordinary canons of construction.
2. The maxim, "utile per inutile non vitiatur," authorizes the rejection of surplusage, and saves from the imputation of uncertainty a verdict which is definite, complete, and certain upon the rejection of the surplusage in which indefiniteness inheres.

3. Under the common canon of construction, that the singular or plural number each includes the other, unless the contrary plainly appears from the context, a verdict finding in favor of "the defendant" will be construed as a finding in favor of all the defendants, where the suit is against two or more persons.

DECIDED JANUARY 15, 1912.

Motion to vacate verdict; from city court of Moultrie—Judge McKenzie. June 24, 1911.

T. W. Mattox, W. F. Way, for plaintiffs in error.

Shipp & Kline, contra.

POWELL, J. The Quitman Oil Company brought suit against the Monk-Sloan Supply Company (a corporation, of which Sloan was president) and C. E. Whitfield. The jury rendered the following verdict: "We, the jury, find for the defendant our verdict for Sloan and Whitfield," signed by the foreman. During the same term, the plaintiffs moved to set the verdict aside, on the grounds, (1) that it is ambiguous and uncertain; (2) that it is in favor of only one defendant, when there are two defendants in the case. The court granted the motion and the defendants excepted.

1. A verdict so uncertain as to be void may be set aside on motion. But "verdicts are to have a reasonable intendment, and are to receive a reasonable construction, and are not to be avoided unless from necessity." Civil Code (1910), § 5927.

2. A canon of construction, often applied to verdicts, is that all surplusage may be disregarded. The maxim, "*utile per inutile non vitiatur*," saves a verdict from the taint of any ambiguity or uncertainty brought about by rejectable surplusage. See, for example, the case of *Southern Ry. Co. v. Oliver*, 1 Ga. App. 734 (58 S. E. 244), and the instances there cited of the perfecting of verdicts by the rejection of surplusage or the application of other cognate canons of construction. The words, "We, the jury, find for the defendant," are a full, definite, and complete verdict. If the added words, "our verdict for Sloan and Whitfield," relate to the defendants named in the pleadings, as they probably do, no harm is done by rejecting them, as they add nothing to the legal effect of the verdict. If the jury, in using these words, were referring to persons outside of the record, their reference to the outsiders is rankest surplusage, and of course it is to be rejected; for the only meaning which could then be given to the added words would be that the jury intended their finding in favor of the defendants to oper-

ate also in favor of certain outsiders—a matter as to which they had no concern. So, by construing the added words as referring to the defendants, or as not referring to them, the legal effect is the same—the added reference is mere surplusage.

3. The point that the verdict is bad because the jury used the word “defendant,” when there were two defendants, is not well taken. It is a common canon of legal construction that “the singular or plural number shall each include the other, unless expressly excluded.” Civil Code (1910), § 4, par. 4.

Judgment reversed.

3631. STORY v. WILLIAMS.

HILL, C. J. There being evidence in this case that the plaintiff was induced to part with the possession of his property by the fraudulent representations of the defendant, and that he was damaged thereby, and that immediately upon discovery of the fraud the plaintiff made an offer to rescind and restore whatever he had received from the defendant by virtue of the contract, a verdict in behalf of the plaintiff, he electing to take a money verdict in lieu of the property, was authorized. Civil Code (1910), § 4305.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Trover; from city court of Douglas—Judge Lankford. June 24, 1911.

O'Steen & Wallace, for plaintiff in error.

Quincey & McDonald, contra.

3635. GRANT v. GENERAL BAPTIST CONVENTION OF GEORGIA.

Points not covered by the issue as presented in the trial court can not be raised for the first time in this court.

DECIDED JANUARY 15, 1912.

Motion to tax costs; from city court of Macon—Judge Hodges. July 1, 1911.

C. H. Hall Jr., L. D. Moore, B. J. Fowler, for plaintiff in error.

Lane & Park, R. D. Feagin, contra.

POWELL, J. An action of bail-trover was brought in the city

court of Macon, the value of the property being alleged as \$75. The plaintiff elected to take a verdict for damages, instead of a verdict for the specific property, and the jury, finding in the plaintiff's favor, gave \$1 damages, whereupon the court entered up judgment for the plaintiff and against the defendant for the costs, amounting to about \$40. The defendant filed a motion in the city court to vacate the judgment so far as the feature of costs was concerned, and to retax them, the insistence being that they should have been taxed against the plaintiff instead of against the defendant. The defendant's written motion was based specifically on two grounds: (1) That the action is a personal action for damages, and the jury returned a verdict for the plaintiff for less than \$10; (2) that the plaintiff, by his election at the trial to take damages in lieu of the specific property, converted the action into a personal action. The defendant's insistence in the trial court was plainly based on the provisions of the Civil Code (1910), § 5984, which provides: "In actions of assault and battery, and in all other personal actions, wherein the jury upon the trial thereof shall find the damages to be less than ten dollars, the plaintiff shall recover no more costs than damages, unless the judge, at the trial thereof, shall find and certify on the record that an aggravated assault and battery was proved." The judge overruled the motion, and the present writ of error was sued out.

Before the case was reached for argument in this court, the plaintiff in error doubtless realized that the section of the code on which he relied did not apply to an action of trover; for the only point insisted upon here is one that is entirely new, so far as the record is concerned, namely, that under the act creating the city court of Macon (Acts 1884-5, p. 470, sec. 3), it is provided that in all suits brought in that court in amounts of \$100 or less, the plaintiff shall recover only justice's court costs. This court can not consider the point thus raised; the trial court has passed on no such point; the decision we are reviewing involved the consideration of no such question. Counsel for the plaintiff in error very ingeniously argue that the greater includes the less, and that since he sought by motion in the trial court to relieve himself of all the costs, he ought now to be allowed to diminish his claim and to relieve himself of any portion thereof illegally taxed against him. Ingenious as this argument is, it is not well taken. In the lower court

he planted his right to have these costs diminished on two specific grounds; the trial court acted upon these grounds, and this court can not now allow this motion to be amended by the insertion of a new ground. The original grounds not having been well taken, the judgment is

Affirmed.

3642. DUREN *v.* LAYTON.

- HILL, C. J. 1. Questions not made before the magistrate when the case was tried, nor before the superior court on certiorari to review the magistrate's judgment, can not be raised for the first time in this court.
2. The finding of the justice in favor of the plaintiff, being right under the evidence, and being approved by the judge of the superior court on certiorari, will not be interfered with by this court because of merely technical objections or immaterial errors of law.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Certiorari; from Thomas superior court—Judge Thomas. April 21, 1911.

Snodgrass & McIntyre, for plaintiff in error.

3719. HAYGOOD *v.* THE STATE.

- HILL, C. J. 1. In a prosecution for assault and battery the accused can not give in evidence as a justification opprobrious or abusive language written and published of him by the person upon whom he made the assault and battery. The question was concluded by the decisions of the Supreme Court in *Mitchell v. State*, 41 Ga. 527, and *Berry v. State*, 105 Ga. 683 (31 S. E. 592). In the present case this question was certified by request of counsel for plaintiff in error to the Supreme Court, in order that the decisions in the above-cited cases might be reviewed and overruled. The Supreme Court reaffirmed these decisions. *Haygood v. State*, 137 Ga. 168 (73 S. E. 81).
2. The act of the General Assembly creating the city court of Fitzgerald (Acts 1907, p. 157) was amended by the act approved August 12, 1910 (Acts 1910, p. 175), as follows: "That the court shall hold twelve terms per year, on the fourth Monday in each month, the terms convening on the fourth Monday in August, November, February, and May to be known as quarterly terms. The jurisdiction of the court shall be the same at all terms, monthly and quarterly. . . . And criminal cases in which jury trial is not waived by defendant, shall be triable only at a quarterly term. For the purpose of disposing of the criminal

business of said court, the same shall always be open without regard to terms." The plaintiff in error made a written request to the judge of the court to hold a monthly term, and, at the term so held, appeared in court, made a demand for a jury trial, was tried by a jury, and was convicted. *Held*: (1) The court had jurisdiction of the case at the monthly term. (2) The accused, under the facts stated, waived his statutory right to be tried at the quarterly term and consented to be tried at the monthly term. He can not be heard, after conviction, to question the jurisdiction of the court.

3. The court, having jurisdiction of criminal cases at both quarterly and monthly terms, was authorized, by the consent of the accused, to try his case at the monthly term. The facts of the present case distinguish it from those cases in which the Supreme Court holds, in effect, that where a court has no jurisdiction of the subject-matter, jurisdiction can not be conferred by consent. The express terms of the statute give the court in the present instance jurisdiction of the subject-matter, and the terms of the trial could be properly waived. *Dean v. State*, 43 Ga. 218; *Osgood v. State*, 63 Ga. 791; *Wiggins v. Tyson*, 112 Ga. 744 (38 S. E. 86); *Smith v. Ferrario*, 105 Ga. 51 (31 S. E. 38); *State v. Sallade*, 111 Ga. 700 (36 S. E. 922).
4. The other points raised by the record, so far as the assignments of error are verified by the trial judge, are entirely without substantial merit, involve no novel questions, and have been settled by frequent decisions of this court and of the Supreme Court, and need not again be passed upon.
5. No error of law appears, and the evidence supports the verdict.

Judgment affirmed.

DECIDED JANUARY 15, 1912.

Accusation of assault and battery; from city court of Fitzgerald—Judge Wall. October 19, 1911.

J. T. Hill, for plaintiff in error.

A. J. McDonald, solicitor, contra.

3780. WILLIAMS *v.* THE STATE.

HILL, C. J. The giving of a check on a bank in payment of a debt, without any representation by the drawer that he has funds in the bank upon which the check is drawn, or that the check will be paid by the bank on presentation, though it be given with knowledge on his part that he has no funds in the bank, does not of itself constitute the offense of cheating and swindling, under the statutes of this State defining that offense. An accusation charging the accused with cheating and swindling the payee of a check, in that he gave to the payee the check in payment of a debt, without further charging that some false representation was

made by the accused to induce the payee to take the check, set forth no offense, and a motion in arrest of judgment should have been sustained.
Judgment reversed.

DECIDED JANUARY 15, 1912.

Accusation of misdemeanor; from city court of Albany—Judge Crosland. October 13, 1911.

The accusation charged J. L. Williams with "the offense of misdemeanor, for the said defendant . . . unlawfully and with force of arms, by false representation of his, the said J. L. Williams', own respectability, wealth, and mercantile correspondence and connections, did obtain a credit, and thereby defraud G. W. Wallace of \$5.00 in money. He, the said J. L. Williams, on the day and year aforesaid, purchased of the said G. W. Wallace merchandise in the sum of \$5.00, and gave to the said G. W. Wallace his, the said J. L. Williams', check [described]; said check being drawn on the Bank of Thomasville; and he, the said J. L. Williams, at the time of the giving of said check, knew that he had no money in or account with said bank; thereby defrauding the said G. W. Wallace out of \$5.00, contrary to the laws of said State," etc. On conviction the accused made a motion in arrest of judgment, on the ground that the accusation was fatally defective, because: (a) There is no charge that the defendant injured the person alleged to have been defrauded. (b) There is no allegation that there was any loss or damage to the said Wallace. (c) There is no allegation that the check was not paid by the bank on which it was drawn. (d) There is no allegation that there were no funds sufficient to cover the check at the said bank at the time the check was made or presented, or at the time the check could be presented. (e) There is no allegation that any money or article of value was delivered by the said Wallace to the defendant. To the overruling of this motion the defendant excepted.

Citations in brief of counsel for plaintiff in error: *Ga. Rep.* 97/199; 120/858; 109/52, 53; *Ga. App. Rep.* 2/154, 696; 4/510; 8/119.

D. H. Redfearn, R. J. Bacon, for plaintiff in error.

J. W. Walters Jr., solicitor, contra.

3823. COTTON *v.* CITY OF ATLANTA.

1. Though there are circumstances under which the same physical act may render the actor guilty of two offenses, one of which may be a municipal offense and the other a State offense, still the municipality can not punish for State offenses. Where a municipal penal ordinance and a public criminal statute operate upon the same set of physical acts, the municipal ordinance is invalid unless the offense created by it contains some characterizing ingredient not contained in the offense under the State law.
2. Section 1837 of the city code of Atlanta, in so far as it makes it punishable for any person to allow a house or a portion of a house to be occupied as a house of ill-fame, creates no different offense from that created by the Penal Code (1910), § 382, and is, therefore, invalid.
3. There is no difference in meaning between the two expressions "house of ill-fame" and "lewd house or place for the practice of fornication or adultery."

DECIDED JANUARY 15, 1912.

Certiorari; from Fulton superior court—Judge Bell. October 7, 1911.

John A. Boykin, for plaintiff in error.

James L. Mayson, William D. Ellis Jr., contra.

POWELL, J. Cotton was convicted in the police court of Atlanta of having violated section 1837 of the code of that city, which reads as follows: "Any person or persons who shall occupy, or allow to be occupied, any house, or portion of a house, to be used as a house of ill-fame in the city of Atlanta, shall, upon conviction thereof, pay a fine of not exceeding five hundred dollars, or be imprisoned not exceeding thirty days, or both, in the discretion of the recorder's court." The specific charge against him was that he, being the proprietor of a hotel, allowed a man and a woman to resort to a room in it for the purpose of fornication. He sought certiorari from the conviction; and to the overruling of the certiorari he excepts.

The point is that, so far as the ordinance in question applies to the case at bar, it is invalid, because it penalizes an act made criminal by a public statute of the State, namely § 382 of the Penal Code (1910), which provides, "If any person shall maintain and keep a lewd house, or place for the practice of fornication or adultery, either by himself or others, he shall be guilty of a misdemeanor." No two propositions are better settled in this State than these: (1) that a municipal corporation can not punish for

an offense against the criminal laws of the State; (2) that the same physical act, by reason of the circumstances surrounding its commission or by reason of the intent with which it is done, or by reason of something else specially characterizing it, may draw to the person committing it such twofold guilt as to make him responsible for two separate offenses, one of which may be a municipal offense, and the other a crime under the public laws of the State. See *Callaway v. Mims*, 5 Ga. App. 9 (62 S. E. 654), and *Athens v. Atlanta*, 6 Ga. App. 244 (64 S. E. 711), in which both questions are lengthily discussed, with an extensive citation of authorities.

These cases just cited will illustrate the two doctrines and show how they work together consistently. The physical act in each of these two cases was the keeping of intoxicating liquor by the accused at his place of business, for the purpose of unlawful sale. The State law made it penal for a person to keep liquors on hand at his place of business, irrespective of the intent or purpose with which they were kept; the municipal ordinance made it unlawful for a person to keep liquors on hand for the purpose of illegal sale, irrespective of the place of the keeping. The accused, who kept the liquors at his place of business and thereby violated the State law, also violated the municipal law, because of the intent and purpose which characterized his keeping. But narrow as the line of demarcation between single and twofold guilt may be, there is a line; and it must be observed. If the thing punished by the municipal ordinance and the thing punished by the State law are one and the same, whether viewed as a physical transaction or whether looked upon with an eye to the ascertainment of the respective legislative objects—if, when viewed in both aspects, nothing to differentiate the municipal violation from the State offense appears, the municipality must give way to the State, and the latter has the exclusive jurisdiction to punish.

For a person to allow any house or portion of a house over which he has control or possession to be used as a house of ill-fame is a violation of the Penal Code (1910), § 382. *Kinard v. State*, ante, 133 (72 S. E. 715). Specifically, it has been held in the recent case of *Fitzgerald v. State*, ante, 70 (72 S. E. 541), that for an innkeeper to rent a room in his hotel to be used for the practice of fornication is a violation of this law. So far as the ordinance in question makes it punishable for a person to allow a house or a portion of a

Judgment affirmed.

house to be occupied as a house of ill-fame, it ordains no more and no less, as to the particular offense, than the State law prescribes on the same subject.

It is true that the ordinance speaks of "a house of ill-fame," while the criminal code speaks of "a lewd house or place for the practice of fornication or adultery," but this is a distinction without a difference. "A house of ill-fame," as used in contexts such as the present, means a lewd house, a bawdry, a place maintained for the practice of fornication and adultery, or for "the convenience and shelter of persons desiring unlawful sexual intercourse." *Posnett v. Marble*, 62 Vt. 481 (20 Atl. 813, 11 L. R. A. 162, 22 Am. St. Rep. 126); *State v. Nichols*, 83 Ind. 228 (43 Am. Rep. 66); *Henson v. State*, 62 Md. 232 (50 Am. Rep. 204). "Both at common law and in common parlance the words 'house of ill-fame' mean a house resorted to for the purposes of prostitution." *State v. Plant*, 67 Vt. 454 (48 Am. St. Rep. 821).

It is unnecessary for us to say whether the rest of the ordinance—that part of it which makes it an offense for a person to occupy a house of ill-fame or a portion of such a house, is valid or not. It is sufficient to the decision of the present case for us to say that so far as the ordinance relates to the present transaction, it is invalid; and that the only jurisdiction of the recorder's court in the matter was to bind the alleged offender over to the State court for trial.

We recognize that expediency might be subserved by allowing police courts to deal summarily with matters of this nature, but the law is otherwise; and law must be the law even among its friends.

Judgment reversed.

3827. LANDRETH v. THE STATE.

No error of law is complained of, and the verdict is strongly supported by the evidence.

DECIDED JANUARY 15, 1912.

Accusation of misdemeanor; from city court of LaGrange—Judge Harwell. October 7, 1911.

M. U. Mooty, for plaintiff in error.

Henry Reeves, solicitor, contra.

HILL, C. J. The plaintiff in error was convicted of a violation of the prohibition law in keeping on hand at his place of business intoxicating liquor, and, his motion for a new trial being overruled, he brings the case here solely on the general grounds.

On Sunday morning a policeman of the city of LaGrange saw the accused enter his place of business, and in a few minutes thereafter a negro also entered. The officer went into the store and told the accused that he had a search warrant for whisky that he believed was in the store, and the accused thereupon took from a thread case four pints of whisky—two of rye and two of corn—and handed them to the officer. The policeman testified that the accused appeared to be coming out of the store just as he, the policeman, entered. The accused explained the possession of the whisky by stating that his wife was sick, and that he had gotten the whisky that morning from two negroes, and had come by the store for the purpose of getting some money to pay for medicine which he intended to procure for his wife. The ingenious counsel for the plaintiff in error suggests to this court two reasons why he thinks the verdict was contrary to law. First, he says that there was no keeping *on hand* of the whisky at the defendant's place of business, and the whisky was temporarily in the place of business while in transit to the defendant's sick wife; and secondly, that the storehouse was not the place of business of the defendant on Sunday, as on that day it was closed to public access.

The first point assumes that the accused told the truth in his statement, in accounting for the presence of the whisky at his storehouse. The jury probably did not give faith to this statement; and, in view of the circumstances, there was some ground for this incredulity. If the whisky was simply in transit, only waiting a few minutes for the accused to get the money, it is somewhat singular that he should have placed it in the thread case, and should have been leaving the store when the officer entered. It is more reasonable to believe that if his statement was the truth, he would have made some temporary deposit while he got the money, and would have taken the whisky with him when he left the store. In other words, there was no evidence that the whisky was simply in transit, but there were circumstances that justified the jury in believing that the whisky was kept on hand at the place of business. The majority of this court, in *Cohen v. State*, 7 Ga. App. 6 (65

S. E. 1096), held that a mere temporary keeping of whisky at a place of business was a violation of this part of the statute.

The second point urged by counsel also depends upon the statement of the accused. The jury, under the evidence, could very well have found that the whisky, although discovered in the store on Sunday, was probably there on Saturday, and would probably be there on Monday. Irrespective, however, of this question, we do not subscribe to the logic of the proposition that a man's place of business ceases to be a place of business on Sunday. We are inclined to the opinion that it remains his place of business on Sunday, although the law prohibits him from transacting his business there on that day. We are clear that the evidence fully supports the verdict, and that the judgment should be affirmed.

Judgment affirmed.

3843. FLAHEVE v. THE STATE.

- HILL, C. J. 1. The legal questions raised by the assignments of error in this case, in the main, are of the same general character as those dealt with by this court in the cases of *Cassidy v. State*, ante, 123 (72 S. E. 939), and *Jackson v. State*, ante, 142 (72 S. E. 941), and are fully controlled by the decisions in these cases.
2. After the jurors had been out for some time considering their verdict, it was not error for the trial judge to have them brought into court and to inquire if they were likely to make a verdict, and how they stood. While the practice of asking a jury in a criminal case how they stand is not approved by a majority of this court, yet where the trial judge says nothing by way of intimation or expression of an opinion on the facts, or to induce the jury to make a verdict, the mere inquiry would be presumptively harmless, and especially so in a case like the present one, where the evidence for the prosecution demanded the verdict of guilty. *Ball v. State*, 9 Ga. App. 162 (70 S. E. 888).
3. The following charge of the court not only embodied a correct principle of law, but was concretely applicable to the evidence in the case: "I charge you that if one lives at or near his place of business and keeps on hand alcoholic, spirituous, or intoxicating liquors in his dwelling house, and said dwelling house is used in connection with his place of business as part of the place of business, and the purpose of keeping such liquors in said dwelling is to have such liquors conveniently located to the immediate place of business, such dwelling house would be in law a part of the place of business, and such keeping on hand with such purpose would be a violation of the law, and would be having and keeping on hand alcoholic, spirituous, and intoxicating liquors at one's place of business."

4. The following excerpt from the charge contains a correct principle of law and one pertinent to the evidence in the case: "I charge you that all parts of one's place of business, including rooms, closets, stairs, yards, and courts used in connection with the place of business itself, are a part and parcel of the place of business."
5. No error of law appears, and the evidence strongly supports the verdict.
Judgment affirmed.

DECIDED JANUARY 15, 1912.

Accusation of violation of prohibition law; from city court of Macon—Judge Hodges. October 7, 1911.

John P. Ross, for plaintiff in error.

Walter J. Grace, solicitor, contra.

3851. PEACOCK v. THE STATE.

- POWELL, J. 1. A person's character is not to be proved by asking a witness what kind of a man that person is. The word "character," as used in legal parlance, is equivalent in meaning to the word "reputation," as used in more precise diction.
2. Self-serving declarations of a person, that he was sick, are usually to be rejected as hearsay, where the witness offering to detail the declarations has no other knowledge on the subject than what he derived from the declarations.
 3. There was enough direct and inferential testimony as to the venue to support the conviction, as to that phase of the case.
 4. A contract to perform labor at a definite rate during the "turpentine season" is not on its face such an indefinite contract as will not support a prosecution for a violation of the Penal Code (1910), § 715; and parol evidence is admissible to establish the common or customary meaning of the words.
 5. When construed in connection with the context, the excerpt from the charge excepted to is not subject to the objection made to it.
 6. The accused was very plainly guilty, and the alleged newly discovered evidence would not probably change the result if a new trial were granted.
Judgment affirmed.

DECIDED JANUARY 15, 1912.

Accusation of cheating and swindling; from city court of Swainsboro—Judge H. R. Daniel. October 27, 1911.

T. N. Brown, for plaintiff in error.

A. S. Bradley, solicitor, contra.

3854. McCULLOUGH v. THE STATE.

1. Where a negro man is on trial, charged with the crime of making a felonious assault upon a white woman, the jury may, in determining the intent with which the assault was made, take into consideration the difference in race, and social customs founded thereon, and, in the absence of any encouragement given by the woman, find that a felonious intent existed, even where the assault was not aggravated and was immediately abandoned upon show of resentment and indignation.
2. Where the general charge to the jury embodies, in substance, legal principles contained in written requests to charge, any error in refusing the requests is harmless.
3. On the trial of an indictment for an assault and battery with intent to rape, where the evidence shows that the lesser offense was committed as a part of the felony, it is ordinarily the duty of the trial judge to define the offense of assault and battery; but an instruction to the effect that if the accused, at the time of making the assault and battery upon the woman, did not entertain the felonious intent charged, he would be guilty of the lesser offense of assault and battery, was substantially equivalent to a definition of assault and battery as pertinent to the evidence.
4. While the jury may believe the statement of the accused in preference to the evidence, they should do so only in the event that they believe the statement to be the truth of the transaction. A charge to this effect was not error.
5. Objections to rulings on the admission of testimony that will probably not occur on a second trial require no decision.
6. The right to poll the jury in a criminal case is an important legal right that should not in any manner be abridged or rendered nugatory by any action of the trial judge. This right must be demanded when the verdict is published and before the jury disperses, and before sentence is imposed. It can not be exercised with justice to the State or to the accused after the jury have dispersed or after sentence has been passed.
7. In a criminal case, where the evidence did not demand the verdict, and where the jury, after having been out considering the verdict for some hours, returned into court, and the foreman handed the verdict to the solicitor-general, who read it aloud, and immediately, upon the conclusion of the reading, the trial judge imposed the extreme penalty of the statute by announcing, "twenty years in the penitentiary," before the attorney for the accused had time to demand that the jury be polled, this conduct of the judge requires the grant of another trial. It deprived the accused of the exercise of his right to poll the jury; and the error was not cured by the subsequent permission to poll the jury, for the sentence destroyed the right or rendered it worthless.

DECIDED JANUARY 15, 1912.

Indictment for assault with intent to rape; from Gordon superior court—Judge Fite. October 28, 1911.

O. N. Starr, for plaintiff in error.

T. C. Milner, solicitor-general, contra.

HILL, C. J. 1. Jerry McCullough, a negro man, was convicted of assault with intent to rape, the alleged victim being a white woman. His motion for a new trial was overruled, and he brings error. In view of the fact that we have decided that another trial should be granted on one of the special assignments of error, it is unnecessary to state the evidence. It is not improper, however, to say that the evidence for the prosecution makes a clear case of assault and battery, but leaves in doubt the felonious intent charged. But the intent with which an assault and battery was made is peculiarly a question to be determined by the jury, and, under the repeated rulings of the Supreme Court as to the question of intent in cases where black men assault white women, with special reference to racial differences and the well-established customs which emphasize these differences, we do not feel authorized to disturb the verdict as being without any evidence tending to establish the felonious intent with which the assault and battery was committed. *Carter v. State*, 35 Ga. 265; *Jackson v. State*, 91 Ga. 322 (18 S. E. 322); *Watkins v. State*, 68 Ga. 832; *Darden v. State*, 97 Ga. 407 (25 S. E. 676); *Dorsey v. State*, 108 Ga. 477 (34 S. E. 135). The doubt, however, on this point, which would unquestionably be sufficient to acquit of a felony but for the decisions above cited, and which, even in the light of these decisions, under the evidence in this case, arises as to the intention of the accused in laying his hands on the woman without actual violence, and in desisting immediately upon the show of resentment on her part, accompanied by the declaration that he intended no harm, makes us the more readily grant a new trial on the assignment of error hereafter considered. If the evidence demanded the verdict as rendered, we would treat this error (which we deem presumptively to have been prejudicial under the facts of this case) as harmless.

2. Exceptions are taken to the refusal of the court to give certain instructions requested, relating to the necessity for showing by evidence the existence of the felonious intent charged in the indictment. These requests substantially state the law and make a concrete application to the facts; but an examination of the general charge given to the jury shows that the material portions of the instructions requested were substantially given, and were

sufficiently applied to the facts to make clear the law on the subject.

3. Objection is also made to the omission of the trial judge to define the offenses of assault and battery and of simple assault. Under the evidence, the charge should have defined the offense of assault and battery; but the judge distinctly told the jury that the accused would not be guilty of the felonious assault charged, unless, at the time he laid his hands upon the female, he intended to commit rape, but would be guilty of the offense of assault and battery; and this instruction was sufficient, in lieu of any more specific definition; for the jury could not have failed to understand, from this charge, that the unlawful laying of the hands upon the female by the accused, without a felonious intent, was in law an assault and battery. The indictment charging an assault and battery with a felonious intent, and the evidence showing an assault and battery, the trial judge could not properly have charged on the subject of simple assault.

4. Referring to the defendant's statement to the jury, the judge charged as follows: "You may believe it in preference to the sworn testimony, provided you believe it to be the truth." It is objected that the use of the word "provided" was an improper restriction of the unlimited right which the statute gives to the jury to believe the statement in preference to the testimony. We do not construe the statute to give to the jury this unrestricted right. The statute in terms says that the jury "may believe" the statement "in preference to the sworn testimony." Penal Code (1910), § 1036. It is a matter of discretion with the jury; but it would be absurd to claim that it was intended to give the jury the right to credit the statement unless they believed it to be the truth of the transaction; and the use of the word "provided" did not restrict any legitimate right of the jury.

5. Several objections were made to the admission of testimony, but it is not deemed necessary to consider these objections, as they will hardly occur on the second trial.

6. We come now to the assignment of error upon which we think, under the facts of this case, the accused should be granted another trial. As before stated, the evidence did not demand the finding. It was doubtful as to the felonious intent. The jury, if the evidence had been clear as to the intent, would promptly have

rendered a verdict of conviction. They were out considering the verdict for several hours, and the only matter about which there was any doubt, or which would have caused any juror to hesitate in agreeing to the verdict as rendered, was the existence of the felonious intent charged. When the jury finally agreed and returned a verdict for a felony, the foreman handed the verdict to the solicitor-general, who published it. "*Immediately*" upon the conclusion of the reading of the verdict by the solicitor-general, while the jury were still standing, and without giving counsel for the accused time to demand for his client the right to poll the jury, the presiding judge sentenced the accused in the following language: "Twenty years in the penitentiary," the extreme limit of punishment allowed by the statute. This precipitate and severe sentence could have had but one effect upon the jury, namely, the impression of judicial approbation of the verdict, and individual indignation against the accused. The sentence thus imposed deprived the accused of his legal right to poll the jury, at least it destroyed any possible value which the accused could have acquired by the subsequent polling of the jury; for even if any juror had been reluctant in consenting to the verdict, and had changed his mind and had concluded to withdraw his assent when polled, this strong approval by the court of the verdict would have induced any wavering juror to abandon any intended dissent and to agree to the verdict on subsequent polling.

The manner in which the sentence was imposed was unusual. It was in striking variance from that orderly judicial procedure which has generally characterized the conduct of judges in imposing sentences in cases of such gravity. In a practice of thirty-five years, twelve years of which was as prosecuting attorney, the writer never knew the presiding judge to impose a sentence of such severity in a case of such grave character without first asking counsel and accused if there was any reason why sentence should not then be imposed, and he has never known the presiding judge in the slightest degree to interfere or prevent the full exercise of the right of the accused to poll the jury after the verdict had been published or by word or deed to impair the possible value in the exercise of such right. This very unusual conduct of the judge must therefore have made a strong impression upon the mind of each one of the jurors, for it is altogether probable that they had never before

seen it occur in court, a place where "justice is judicially administered." The writer fully sympathizes with the judge in any indignation that he may have felt on account of the heinousness of the crime of which the accused had been convicted; nevertheless, above everything else, although convicted, the accused should have been given the full, free, and valuable exercise of any right to which he was entitled under the law.

Practically, the act of polling the jury has rarely resulted beneficially to the accused. In fact, in the writer's experience above stated, he has never seen it result in any practical benefit; but, if there ever was a case in which it might possibly result in benefit, it would be a case where, under the evidence, there was doubt as to the felonious intent, and where the jury had for several hours considered the evidence before arriving at a satisfactory conclusion as to the existence of such intent; for it must be conceded that nothing short of grave doubt would have caused hesitation and a delay of several hours in arriving at a verdict. The law of this State places a high value in criminal cases upon the right of the accused to poll the jury. In civil cases the right is discretionary with the presiding judge; but in criminal cases polling is not a privilege to be granted in the discretion of the judge, but is a legal right, and it has always been held to be a material and reversible error to refuse the free exercise of this right. *Tilton v. State*, 52 Ga. 478; *Russell v. State*, 68 Ga. 785, 788; *Blankenship v. State*, 112 Ga. 402 (37 S. E. 732). Did the judge deprive the accused of this legal right or impair its value? For the reasons given above, we think that he did, because it made the subsequent exercise of the right which he granted worthless. The polling of the jury amounted to nothing, in the face of what was necessarily implied by the hasty and severe sentence. Besides, no opportunity was given to counsel for the accused to demand the right before the sentence was imposed.

The recital in the bill of exceptions is that "*immediately*" upon the reading of the verdict the sentence was passed. The word "*immediately*" means "*instantly*," "*at once*." Standard Dictionary. And when the judge verifies this recital in the bill of exceptions, it is equivalent to stating that "*instantly*," "*at once*," upon the reading of the verdict, he imposed the sentence.

In support of the views here stated we cite the case of *Robinson*

v. *State*, 109 Ga. 506 (34 S. E. 1017), in which the Supreme Court held that "it is too late to poll a jury after the sentence of the court has been pronounced." In that case the jury had not separated and mingled with the public after the verdict had been published; that would destroy the right to poll; but the presiding judge, some minutes after the publication of the verdict, passed sentence, and the reason why it was too late to poll the jury after sentence had been imposed is stated in the opinion of the Supreme Court to be analogous to the reason why the right is lost after the jury have mingled with the public. The language of the opinion is as follows: "The well-settled rule that a request to poll a jury should be made before the members of it disperse and mingle with the bystanders is, of course, based upon the idea that it would be dangerous to allow a juror who might have heard something calculated to change his mind to have an opportunity to recede from a verdict to which he had really agreed. Certainly, nothing would be more likely to have such an effect than a sentence of which a juror did not approve. In this case, the punishment inflicted was, we are informed, a term of fifteen years in the penitentiary, and it would not have done to allow the jury to be polled after they knew what the judgment of the court was. We think it was a proper one, but no man can tell how the jurors may have regarded it, or that, after it was announced, some of them might not have desired to annul a verdict to which they had deliberately assented." The reason here stated by the Supreme Court for making it improper to poll a jury after the sentence had been passed is that some juror might, on account of the severity of the sentence, be induced to recede from his verdict. Logically the same reason applies where not only the severity of the sentence, but the manner in which it was imposed, might have led a reluctant juror to adhere to the verdict, although he had determined to recede therefrom when polled.

We think, under the principle here decided, that the accused in this case must be granted a new trial. In courts of justice, where order and deliberation should characterize every step of judicial procedure, no necessity should be created for an unseemly contest between the presiding judge and counsel for the accused. The attorney should not be required to be acutely on the alert to precipitately, and immediately upon the reading of a verdict, jump to his feet and demand the right to poll the jury, for fear that the

presiding judge might destroy this right by the too quick imposition of sentence. He should rest content in the knowledge that he will be given every opportunity to demand for his client every right to which he is under the law entitled, and that nothing will be done by the presiding judge to deprive him of this right or to prevent its exercise in such manner as to secure to his client the full value which the law implies in the bestowal of the right.

Judgment reversed.

3558. HARRIS *v.* CITY OF ROME.

If a municipal corporation, in grading a street, so changes the natural flow of the drainage from a contiguous lot as to create a pond and to render a street drain necessary to prevent hurtful accumulation of standing water, and, in pursuance of its duty, opens a ditch necessary for the discharge of this water, but thereafter permits it to become obstructed; and fails to remove the obstruction, though requested to do so, and if, by reason of the filling of this ditch, which is in the street and under the control of the municipality, a nuisance is created, the municipality would be liable for the damage caused by the continuance of the nuisance, even though the pond might be located on private property. The liability for the damages caused by a nuisance rests primarily upon the party whose act created the nuisance; and especially is this true where it is within the power of such party to discontinue the condition which gave rise to the nuisance.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Floyd county—Judge Reece. June 21, 1911.

Eubanks & Mebane, for plaintiff.

Max Meyerhardt, Maddox & Doyal, for defendant.

RUSSELL, J. The present case is distinguished by its facts from *Mayor &c. of Dalton v. Wilson*, 118 Ga. 100 (44 S. E. 830, 98 Am. St. R. 101). In that case a ditch on private property contained the obstruction that caused the injury; and the owner of the hotel, from which the sewer extended into the ditch, controlled the hotel, sewer, ditch, obstruction, and pond, and was consequently responsible for the nuisance. Neither the nuisance nor its cause was under the control of the city, nor on city property. In the case at bar the petition, with the amendments, alleged, that the nuisance was created by the city's having raised the sidewalk and cut ditches along, in, and through the sidewalk and street, for the purpose of letting the

surface water escape, and that, after having cut the ditches for this purpose, the city allowed the ditches in the street to fill up, and, by reason of the filling up of the ditches in the sidewalk and street, a pond of foul and fetid water, alleged to be a nuisance, accumulated; that the obstruction was allowed to gather in the ditch, so that there was no outlet for the water through the embankment, which the city itself had made in raising the street, and that the city, with knowledge of this fact, allowed the obstruction to remain, refusing the plaintiff's demand that it be removed and the pond be allowed to drain. It will therefore be seen that the two cases are not identical. In the case cited, *supra*, the cause of the obstruction and nuisance was that the owner or person in control of the hotel, and of the property in which the ditch was constructed for the purpose of outlet, permitted foul and fetid matter to accumulate in the ditch and pond on the property. In other words, the City of Dalton did not create the nuisance, but only stood by and failed to abate it. In the case at bar the ditches are in the street and under the control of the city, according to the allegation of the petition, and it is alleged that after these ditches, which it is the duty of the city to keep open, are filled up, the city refuses to abate the nuisance for which it is responsible. According to the allegations of the petition, the raising of the sidewalk by the city caused the necessity for the digging of the ditch through the sidewalk and street. This ditch upon the city's property, which the city's act rendered necessary, and which it is the city's duty to keep open, is the ditch in which the obstruction, which has caused the pond to form, exists and is permitted to remain, according to the allegations of the petition. In the *Wilson* case, *supra*, the cause of the nuisance was on a private lot; in the case at bar the cause of the nuisance is in the street and sidewalk. In the *Wilson* case the owner of the lot could have abated the nuisance, but the owner of the lot in the present case would have no right to go into the street and dig open ditches, or otherwise drain the pond by excavations upon the street. While it is true the pond was on private property, as in the *Wilson* case, the sole cause of the formation of the pond is traceable to the act of the city. The judgment was reversed in the *Wilson* case because it did not appear that the municipality was in direct control of the property upon which the alleged nuisance existed, or of the ditch or sewer; in other words,

because it was not alleged in terms that the municipality maintained, controlled, or operated the alleged nuisance. In the case at bar it is distinctly alleged that the city controls the ditch that brought about and continues the nuisance. The petition as originally filed was perhaps subject to demurrer, but, the amendment showing that the pond was due solely to the fill made by the city in the street, and that the city undertook, as was its duty, to prevent a nuisance by running a ditch across the sidewalk into the main gutter of the street, the municipality would clearly be liable if it be shown that a nuisance was created by the fact that the city allowed the only outlet for this water, which was through its sidewalk, to become obstructed so as to create a nuisance with consequent damage. We therefore think that the trial judge erred in sustaining the demurrer and dismissing the petition.

If a municipal corporation, in grading a street, so changes the natural flow of the drainage from a contiguous lot as to create a pond, and to render a street drain necessary to prevent the hurtful accumulation of standing water, and, in pursuance of its duty, opens a ditch necessary for the discharge of this water, but thereafter permits it to become obstructed, and fails to remove the obstruction, though requested to do so, and if, by reason of the filling of this ditch, which is in the street and under the control of the municipality, a nuisance is created, the municipality would be liable for the damage caused by the continuance of the nuisance, even though the pond might be located on private property. The liability for the damage caused by a nuisance rests primarily upon the party whose act created a nuisance; and especially is this true where it is within the power of such party to discontinue the condition which gave rise to the nuisance.

Judgment reversed.

3478. ATLANTIC COAST LINE RAILROAD CO. v.
CHEEKS, administratrix.

The court erred in not compelling the plaintiff to state her case more definitely, in response to the special demurrer.

DECIDED JANUARY 15, 1912.

Action for damages; from city court of Richmond county—Judge W. F. Eve. May 25, 1911.

The action was for damages on account of the homicide of Joseph Cheeks. The original petition alleged, that on May 2, 1910, trains operated by the defendant company ran over and killed Cheeks about one and a half miles east of Beach Island station in the State of South Carolina; that the homicide was caused entirely by the negligence of the defendant company, its agents and servants, and without any fault or negligence on the part of the deceased; that at the time of his death he was 35 years of age, was earning \$2 per day, and had a life-expectancy of 31 years, and, as a consequence, the plaintiff was damaged in the sum of \$10,000. The plaintiff sued as administratrix of the decedent's estate, and for the benefit of herself and her minor children, as his widow and children respectively, basing the suit on certain statutes of South Carolina, which were set out. It was alleged that she had been appointed as administratrix by the ordinary of Richmond county, Georgia, and that the defendant was a corporation chartered under the laws of the State of Virginia, having an office and place of business in said county, and operating a line of railroad in the State of South Carolina. The original demurrer was on the following grounds: (1) The petition sets out no cause of action. (2) The petition is vague and indefinite, and does not set out facts sufficient to show that the plaintiff has a cause of action under the statutes referred to. (3) The allegation of negligence is a conclusion of the pleader, without a statement of any facts sufficient to show that the defendant was guilty of negligence, and without showing whether the deceased was a passenger, employee, licensee, or trespasser, or the circumstances of his injury, so as to show the measure of duty owed him by the defendant, and whether it performed or failed in performing its duty in the premises. (4) The plaintiff, as administratrix, appointed under the laws of Georgia, has no cause of action under the South Carolina statute, for a homicide alleged to have been committed in South Carolina by the defendant, a corporation not chartered by the laws of Georgia, but incorporated under the laws of Virginia.

By amendment the following paragraphs were added to the petition: (11) The said Joseph Cheeks, in a state of helplessness or unconsciousness, was seated on the railroad track of defendant at a point on said track where he was seen, or could have been seen, by the engineer or fireman of the train of the said railway com-

pany, for a distance of a quarter of a mile, more or less, and the said railway company could have avoided the injury to said Cheeks by the exercise of ordinary diligence, and their running over and upon him and killing him, under the circumstances set forth, was negligence. (12) The failure of the defendant company, upon seeing the said Cheeks seated upon the said railroad, in a state either of helplessness or unconsciousness, to have gone to his assistance was negligence. (13) The said railway company, by the exercise of reasonable diligence on its part, could have discovered the said Cheeks in time to have prevented the killing of the said Cheeks, who was in a state of apparent helplessness, and the failure to have seen the said Cheeks, who was seated on the railroad track, in full view of the engineer of the said train and the fireman of said train if the said engineer and fireman had kept a reasonable lookout, was negligence on the part of the defendant. (14) The defendant was negligent in having ejected from its train the said Cheeks in a helpless condition, leaving him by the side of the railway track, and knowing that another train on said railway would be passing over the place where he was ejected, and knowing of his helpless condition, and of the peril of leaving him in that condition, and making no effort to avoid the consequence of their act by any special acts of precaution was negligence on the part of the said railway company. To the petition as amended the defendant renewed its demurrer, and further demurred as follows: (1) To paragraphs 11, 12, and 13, because the plaintiff fails to allege what right Joseph Cheeks had to be upon the track, and what legal duty the defendant owed him, and how the engineer knew that he was helpless or unconscious, and why the engineer could not assume that if he was on the track a quarter of a mile from the engine, he could see the engine as easily as the engineer could see him, and get off the track; also because the negligence complained of was not the proximate cause of the injury; also because the plaintiff fails to say whether the said Cheeks was actually unconscious, or was conscious and yet helpless. (2) To paragraph 14, upon the same grounds, and particularly because it is not alleged how the defendant was negligent in having ejected Cheeks from the train, and when and where the ejectment took place. The allegation is that Cheeks was left on the side of the railroad track. Defendant demurs because it is not alleged whether he was left on

the side of the track at a station, or at a place not a station, and, if at a station, what station; also because it is not alleged how he was ejected, and why, and what duty was upon the company when leaving him in a helpless condition,—whether there is a duty upon the company to provide nurses and employ them to stay with persons who get on its trains and are ejected in a helpless condition; also because it is not alleged what was Cheeks's condition when he got on the train and when he was ejected; also because the negligence complained of was not the proximate cause of the injury.

William K. Miller, for plaintiff in error.

T. F. Harrison, C. Henry & R. S. Cohen, contra.

POWELL, J. The nice questions ably argued by counsel for the respective sides can not be intelligently passed on by the court, because the allegations of the petition are too indefinite to present these questions clearly. There was a special demurrer, demanding greater certainty, and the court overruled it, and exception is duly taken. We think it best to leave the question of ultimate liability open till the petition is made more specific. To aid the court in the further conduct of the case, let us say that if the decedent was a plain trespasser on the defendant's tracks no liability exists unless the petition is made to show, by its allegations of fact, and not by mere statements of conclusions, that the engineer acted with wantonness or wilfulness. This is the rule in the State where the case arose, as well as in this State. If the plaintiff relies on prior negligence of the defendant in putting the decedent on its tracks, the full circumstances as to this should be disclosed. The 3d ground of the original demurrer was well taken, so far as it called for the facts showing whether the decedent was a passenger, employee, licensee, or trespasser, and showing what duty the defendant owed him, and the facts from which that duty arose. Likewise, paragraph 1 of the demurrer to the petition as amended should have been sustained, so far as it calls for further information, and so far as it points out the ambiguity of allegation as to whether the decedent was actually unconscious, or merely helpless though not unconscious. Paragraph 2 of this second demurrer should have been sustained, so far as it points out deficiency of allegation as to how or wherein the defendant was negligent in ejecting the decedent, and as to where the ejection occurred, and wherein

the ejection at that place was improper. Let these points be brought out with clearness, and then the court can say whether a cause of action is set forth.

Judgment reversed.

3266. FARMERS OIL & GUANO CO. v. SOUTHERN REFINING CO.

HILL, C. J. 1. A. made an express written contract with B. to furnish him, within a definite time and at a specified price, three tanks of crude cottonseed oil. In part performance of the contract A. did furnish to B. one tank of the oil, and then neglected and refused to furnish the other two. B. thereupon went into the open market and bought the two tanks of oil, and sued A. for the difference between the contract price and the market price. *Held*:—On proof of the contract and its breach, and of the resultant damage, in the absence of defense, B. was entitled to recover.

2. Where a motion is made to continue the trial of a case because of the absence of a witness, the judge may consider the evidence expected to be given by the absent witness, in connection with the pleadings, for the purpose of determining the materiality of the evidence, and if he finds that the testimony of the absent witness would be either immaterial or inadmissible, he should refuse the motion. The plea in this case made the testimony of the absent witness immaterial as to some part of it, and inadmissible as to the other part, and there was no error in refusing the continuance. *Richter v. State*, 4 Ga. App. 274 (61 S. E. 147); *Butler v. Ambrose*, 51 Ga. 152.
3. Where exceptions pendente lite were not duly preserved, and no timely exception was made in the final bill of exceptions, as to a judgment overruling a demurrer to a petition, an assignment of error thereon in the motion for a new trial will not be considered by this court. *Connor v. Hodges*, 7 Ga. App. 153 (66 S. E. 548); *White Sewing Machine Co. v. Horkan*, 7 Ga. App. 283 (66 S. E. 811); *American Insurance Co. v. Bailey*, 6 Ga. App. 424 (1), (65 S. E. 160).
4. The original petition having set out in substance the contract sued on, it was not a cause for surprise that an amendment to the petition set out in exact terms the contract; and especially is this true where the answer also set out the contract, and a copy thereof was in the possession of the defendant. Besides, the refusal to continue because of alleged surprise caused by amendment is not ground of reversal, unless the refusal was a manifest abuse of discretion. *Mayor &c. of Cordele v. Williams*, 7 Ga. App. 445 (2), (67 S. E. 116).
5. A stipulation in a contract to sell cottonseed oil, that any difference between the parties shall be settled by arbitration according to the rules of the Cotton Seed Crushers Association, will not prevent a suit in the first instance to recover damages for a breach of contract, unless it is clearly provided in the contract that this mode of arbitration or settlement shall either be a condition precedent to the right of recov-

ery, or constitute the only method for the assessment of damages arising from the breach. *Adams v. Haigler*, 123 Ga. 665 (3), (51 S. E. 638).

6. The evidence fully supports the verdict, and no merit appears in any of the grounds of the motion for a new trial.

Judgment affirmed.

DECIDED DECEMBER 19, 1911. REHEARING DENIED JANUARY 15, 1912.

Complaint; from city court of Sandersville—Judge Hawkins presiding. January 30, 1911.

John R. Cooper, A. R. Wright, for plaintiff in error.

Evans & Evans, contra.

3406. FARMERS OIL & GUANO CO. v. ROSENTHAL & CO.

HILL, C. J. 1. The principle of law is well settled that a contract which is valid on its face can not be held void by showing that one of the parties understood and intended it to be a wagering contract. The evidence must show that this understanding and intention was mutual, to render a contract, otherwise legitimate, invalid on that ground. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 205 (37 S. E. 485, 81 Am. St. R. 28); *Stewart v. Postal Telegraph Co.*, 131 Ga. 31 (61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. R. 205); *Watson v. Hazlehurst*, 127 Ga. 298 (56 S. E. 459); *Embry v. Jamison*, 131 U. S. 336 (9 Sup. Ct. 776, 33 L. ed. 172); *Bibb v. Allen*, 149 U. S. 481 (13 Sup. Ct. 950, 37 L. ed. 819).

2. Executory contracts for future delivery of personal property which the vendor does not possess or own at the time, but which he expects to obtain by purchase or otherwise before or by the date when the contract is to be executed by delivery of the property, are valid, if at the time of making the contract an actual transfer and sale of the property is contemplated by the parties to the transaction. *Clews v. Jamieson*, 182 U. S. 491 (21 Sup. Ct. 845, 45 L. ed. 1183).

3. Letters written by the president of a corporation, apparently within the scope of his duties and pertinent to the issue under investigation, are admissible in evidence against the corporation. *L. & N. R. Co. v. Tift*, 100 Ga. 87 (27 S. E. 765); *Merchants Bank v. State Bank*, 10 Wallace, 644 (19 L. ed. 1008).

4. The contentions of the defendant were fully and fairly presented in the charge of the court, and the requests to charge, so far as pertinent and sound, were covered by the general instructions. The evidence strongly supports the verdict, and no reason whatever is shown why another trial should be had.

Judgment affirmed.

DECIDED DECEMBER 19, 1911. REHEARING DENIED JANUARY 15, 1912.

Complaint; from city court of Sandersville—Judge Jordan. March 25, 1911.

John R. Cooper, A. R. Wright, for plaintiff in error.
Garrard & Gazan, Evans & Evans, contra.

3204. CUTTS *v.* WATT-HARLEY-HOLMES Co.

RUSSELL, J. The evidence, though conflicting, supported the verdict rendered, and none of the assignments of error are of sufficient materiality to have required the grant of a new trial. This verdict being the second verdict in behalf of the plaintiff, and being approved by the trial judge, it will not be disturbed.

Judgment affirmed. Pottle, J., not presiding.

DECIDED JANUARY 30, 1912.

Appeal; from Wilcox superior court—Judge Whipple. December 6, 1910.

M. B. Cannon, Max E. Land, for plaintiff in error.
Hal Lawson, contra.

3324. MARTIN *v.* MENDEL.

The decision in this case is controlled by the rulings of the Supreme Court in *Williams v. Johnston*, 94 Ga. 722 (19 S. E. 888), *Anderson v. McLean*, 94 Ga. 798, 801 (22 S. E. 302), and *Gwinn v. Almand*, 110 Ga. 318 (35 S. E. 150). When more than a year had elapsed since the filing of a motion for a new trial, there was no abuse of discretion in dismissing it on the ground that no brief of evidence had been filed, though it appeared that at the time first set for the hearing of the motion, counsel for the movant presented to and left with the trial judge a paper which purported to be a brief of the evidence, it appearing that it was not approved as such by the judge, because it was not correct, and it further appearing that the court had several times continued the hearing in order to enable the movant to correct the brief, or to agree thereon with opposing counsel, and that the judge, on account of the lapse of time, was unable to remember the evidence. It would in any event be fruitless to reverse the judgment dismissing the motion for new trial; for if the trial judge does not remember the testimony, the brief of evidence can not be approved, and without it the motion is so incomplete as to be absolutely nugatory.

DECIDED JANUARY 30, 1912.

Motion for new trial; from city court of Monroe—Judge Stone. January 10, 1911.

W. O. Dean, for plaintiff in error. *Orrin Roberts*, contra.

RUSSELL, J. The sole question presented by this writ of error is whether the trial judge erred in dismissing the motion for new trial upon the ground that no brief of the evidence had been filed as required. It appears that a judgment was entered in favor of Mendel against Martin on January 7, 1910. A motion for new trial was made, and the court thereupon passed an order providing that the movant should have until the hearing to prepare and present for approval a brief of the evidence, and that the judge might enter his approval upon the brief of evidence at any time in term or in vacation. The time set for the hearing of the motion for new trial was January 20, and on that day the movant presented what he claimed to be a correct brief of the evidence adduced upon the trial. The judge declined to approve the brief, holding that it was incorrect, and the case was duly continued until January 27, when, the judge not being present, the hearing went over to the next regular April term of the court. It was thereafter continued from time to time until the 10th of January, 1911, when a motion of the plaintiff's counsel to dismiss the motion for a new trial was sustained by the court, in the following order: "On hearing the foregoing motion to dismiss movant's motion for new trial, and it appearing that counsel can not agree upon a brief of the evidence in the case, and the court not being able to remember the evidence at this time, [owing] to the great lapse of time since said case was tried and the amount of business disposed of by the court, it is therefore ordered and adjudged by the court that said motion to dismiss be, and the same is, hereby sustained, and the motion for new trial dismissed." The plaintiff in error excepts to the order dismissing the motion for new trial, and urges that, under the plain provisions of the code, it was the duty of the judge, if the movant's brief was not correct, to correct and approve it; that after a lapse of several months the court can not refuse to approve a brief of the evidence on the ground that counsel can not agree to it and that the court does not remember the evidence; that if the court could do this, the motion for a new trial in any case could be dismissed at the will of the judge by his mere refusal to approve the brief of evidence.

The history of the case is to be found in the judge's explanatory note to the bill of exceptions, and we can not go anywhere else to ascertain the truth as to what occurred antecedent to the motion

for new trial. The qualifying statement of the judge in certifying the bill of exceptions is as follows: "On January 20th, the day set for the hearing of the motion, counsel for both parties appeared, but had not agreed upon the brief of the evidence. They could not then agree upon it. The court then read over the brief presented by movant, and could not approve the same, because it was not correct. At the request of both counsel, an order was passed setting the hearing for January 27th, in order to give counsel an opportunity to agree upon a brief—all of the papers in the case then being handed back to counsel for movant. I may have been absent on the 27th, but several times thereafter I urged both counsel to try to agree upon a brief, and upon such parts of it that they could not agree the court would settle the differences, and hear the motion any day they agreed on. Counsel for movant took the position that as the 27th had passed and no order was taken setting the hearing for a later date, the case could not be heard except at a regular term of the court. At the regular April term of the court counsel for movant complained of being unwell and did not appear with the motion, and no order was then taken in the matter. Thereafter the court again urged counsel to dispose of the motion while the facts in the case were comparatively still fresh in the mind of the court. During all of this time the papers in the case were not in my hands. On April 28 counsel for Mendel drew an order for the court's signature setting the hearing for the next day. The court did not sign this order, for the reason that it was reported to him that movant's counsel would not agree to any day except at a regular term of the court. In the meantime counsel for Mendel presented to the court a brief containing his contention as to the evidence. The court refused to approve it, for the same reason it refused to approve movant's brief,—it was not true and correct. The papers were then left in my office until some time after the July term of the court, when they were again taken out by movant's counsel, with the understanding that counsel would get together and try to agree on a brief of the evidence. I do not now remember why the motion was not heard at the July term of the court, but I do know that counsel made no effort to have it heard, nor took any order for its hearing in the future. At the October term the court, of its own motion, called the case and asked if counsel had yet agreed on a brief; they answered that they had not; whereupon

the court, by consent of both counsel, orally set the motion for a hearing the next day in my office. Counsel for Mendel appeared at the hour set, but counsel for movant failed to appear. The court then again set the hearing for 2 o'clock in the afternoon and requested counsel for Mendel to notify movant's counsel. At the appointed time counsel for Mendel again appeared, and reported that he had notified counsel for movant. The court waited all day, but movant's counsel never did appear. At the January term, 1911, the court again called the case. Counsel for both parties then stated that they had not agreed upon a brief of the evidence and could not agree. At the request of counsel for movant, I then took up the evidence with counsel, but found that they could not agree on material parts of it, and on account of the length of time intervening since the trial of the case, and the great number of cases tried, and other business disposed of by the court in the meantime, I was totally unable to remember the evidence. I knew that the brief originally presented by movant was not correct, but in what particulars I could not then remember, and for that reason could not approve a brief. The court therefore sustained the motion to dismiss the motion for new trial, for the reasons therein mentioned. All of the papers in the case were in the possession of movant's counsel from the time the original motion for new trial was filed until some time after the April term of court, and again from some time after the July term, 1910, to the January term, 1911, but no other brief of the evidence was ever presented to the court by movant's counsel for the court's approval, except the first one, which the court then could not approve as being correct."

From the statement of the judge it appears that the real ground upon which the motion was dismissed was that the court, after the long lapse of time, could not remember the evidence so as to approve the brief. Of course, it followed that if there was no brief, there could not be a motion for a new trial; and, the motion being defective, there was no error in dismissing it. After reading the statement of the judge we can not say that he abused his discretion in dismissing the motion. It is well settled that in a case like the one at bar the approval or disapproval of the brief of evidence is a matter of discretion, and it does not appear that the plaintiff in error would gain any advantage in a case like this if the reviewing court should hold that the lower court had abused its discretion.

We could not order a new trial, because the judge has not passed upon the motion. We could not direct him to approve the brief of evidence as presented, because it is not correct. We could not require him to correct it, because he does not remember what the evidence was. If in a case such as that now before us the reviewing court should hold that the judge abused his discretion because the long delay which caused the lapse of memory was due to his laches, and should reverse his judgment of dismissal of the motion, thereby directing the judge to use his discretion in approving the brief and in passing upon the motion, we would move in a circle, because the judge does not remember the evidence, and no matter to whom fault for the delay is to be charged, the brief can not be approved nor the motion perfected. This would seem to be a case of a right without a remedy; because, in our view of it, where a brief of evidence is presented to the judge any time within the terms of the order of the court, it would seem that counsel for the movant has done all that is required of him under the provisions of the Civil Code (1910), §§ 6089, 6090, 6093. There is no requirement that counsel for the movant for new trial should agree to the brief of evidence with his adversary. The statute says it is to be approved by the judge, and it would seem that where a bona fide effort has been made to prepare a correct brief of the evidence, and such a brief is timely presented to the court, the judge should himself correct any errors he may detect, or at least call the attention of movant's counsel to these errors, and, after pointing them out, require counsel to correct them. There is, to our minds, a striking analogy, so far as the duty of the judge in this regard is concerned, between the approval of the brief of evidence in a motion for a new trial and the certifying of a bill of exceptions. However, with relation to the approval of the brief of evidence there is no statutory provision similar to that which requires a judge, upon the presentation to him of an incorrect bill of exceptions, to return it and, pointing out specifically the errors to be corrected, require the correction within a reasonable time of the errors pointed out by him. It is true, as insisted by counsel for the plaintiff in error, that under this view of the law, a judge can absolutely deprive a litigant of his rights, by refusing to approve a brief of evidence, or to point out the defects in it, until such lapse of time has occurred that the judge, not being able to remember the testimony,

can not approve any brief in the case. And yet the same thing is true as to grounds of a motion for new trial which may not be based upon the evidence at all, but relate to the errors in the charge, injurious conduct of the judge, or a variety of matters which may affect the trial. As to each of these the discretion of the judge to approve, or to refuse to approve, any or all of the grounds of the motion for new trial is unconditional and uncontrollable. The judge can not be required to approve the statements of the grounds of a motion for new trial, however vital they may be to the movant's rights. The law leaves the exercise of the judge's discretion as to such matters solely in his hands; and, without any reference to the judge who presided in the case now before us (and whom the writer knows to be absolutely honest, impartial, and just), we might repeat the old jest, that the only remedy for the wrong, if any is committed, is to get another judge at the expiration of the incumbent's term. *Judgment affirmed. Pottle, J., not presiding.*

3325. HARTFELDER & COCHRAN v. CLARK.

RUSSELL, J. 1. Under the pleadings and the evidence in this case, the court did not err in instructing the jury that the mere fact that the plaintiff gave only \$15 for the notes in suit would not be sufficient to authorize the finding that he was not a bona fide purchaser of them. "Mere inadequacy of consideration alone will not void a contract." Civil Code (1910), § 4244.

2. If specific instructions are desired as to the legal effect or bearing of a particular point or fact disclosed by the evidence as related to a contention, a written request to that effect should be preferred. Where error is assigned upon the ground that the court failed to submit to the jury in his charge the question as to whether a suit upon the notes involved in the pending action had been determined in another court, and where a plea in abatement, setting up this fact, has been stricken, but no exceptions have been taken to the order striking it, *held*, that while the pendency of the former suit might be a circumstance tending to show that the plaintiff had knowledge of the defenses to the note, and available evidence in support of the plea that the plaintiff was not a bona fide purchaser, it must be presumed, inasmuch as the charge of the court was not sent up, that the judge properly charged the jury upon the defense presented by the plea, although he made no explicit reference to the specific point in the testimony referred to in the assignment of error.

Judgment affirmed. Pottle, J., not presiding.
DECIDED JANUARY 30, 1912.

Complaint; from city court of Springfield—Judge J. Hartridge Smith. January 21, 1911.

P. W. Meldrim, R. W. Sheppard, E. A. Cohen, for plaintiffs in error.

D. H. Clark, contra.

3335. CENTRAL OF GEORGIA RAILWAY CO. *v.* BIRD.

Where a railroad company, in pursuance of an agreement with a warehouse company, places one of its cars on a side-track in front of the warehouse, for the purpose of having the car loaded with cotton stored in the warehouse, for immediate shipment, the railroad company to pay for the work of loading, and the cotton is loaded on to the car by employees of the warehouse company, properly marked as to destination, and with name of consignor and consignee, this is a delivery to the railroad company as a common carrier of the cotton, and the railroad company would be responsible to the owner of the cotton for its destruction by fire while in its possession.

DECIDED JANUARY 30, 1912.

Action for damages; from city court of Statesboro—Judge Boykin presiding. February 18, 1911.

Lawton & Cunningham, Alexander R. Lawton 3d, for plaintiff in error.

A. M. Deal, contra.

HILL, C. J. Bird recovered a verdict from the Central of Georgia Railway Company, for \$3,052.58 as damages, the value of 41 bales of cotton consumed by fire while in a car of the defendant, and the case is here on exceptions to the judgment overruling the defendant's motion for a new trial. The facts, briefly stated, are as follows: Bird, the owner of the 41 bales of cotton, placed them in the Farmers' Union Warehouse at Metter, Georgia, marked for shipment to Savannah, Georgia. This warehouse was within three or four yards of the track of the defendant, and between three and four hundred yards from its depot. The defendant, in pursuance of custom and under an agreement it had with the warehouse company, placed a car for the reception of this cotton near the warehouse, the owner of the cotton intending that it should be transported to Savannah the day after the loading of the car with the cotton. The agents of the warehouse company loaded the car with

the cotton, and, in the afternoon, having completed the loading, closed the door of the car, but did not seal it. The evidence was in conflict as to whose duty it was to seal the door of the car, whether that of the agents of the warehouse company, or that of the agents of the railway company. The loading of the car was completed in the afternoon, about 5 o'clock. On the same night, between 10 and 11 o'clock, the car, with the cotton, was entirely consumed by fire. A mixed freight and passenger train passed between 12 and 1 o'clock in the daytime, while the car was being loaded. The next and only train that passed before the fire was a passenger train, which passed at 5.45 o'clock p. m. The agents of the warehouse company who did the loading testified that neither one of them smoked, that there were no matches about the car, nor anything else by which the cotton could have been ignited, so far as they could discover, when they closed the car and left it. It was proved by the railroad company that at the point where the car was located, although the track was up-grade, on account of its proximity to the depot where both the freight and passenger trains were stopped, no sparks were emitted by either one of the engines of these trains, the engineers of both trains testifying that their engines were simply rolling as they passed the warehouse, and that engines never emit sparks when rolling, but only when they are working. The first freight train upon which the cotton could have been moved after it had been loaded in the car was one on the next day, which was expected to take up the car for the purpose of transporting it to Savannah, its destination, and this train was expected to pass Metter on the next morning between 10 and 11 o'clock.

A contract between the Farmers' Union Warehouse and the Central of Georgia Railway Company was introduced in evidence, by the terms of which the railway company agreed to issue "its regular cotton bills of lading on cars by the said Farmers' Union Warehouse at cotton warehouse situated upon the side-track of the said railway company at Metter, Ga., upon the written statement of the said Farmers' Union Warehouse, their agents or employees, as to the consignor, consignee, destination, number of bales, and marks of all cotton so loaded at cotton warehouse," upon certain conditions as to the method of loading and as to the care and diligence of the warehouse company to see that the cars were in a proper and "clean condition, that is, free from anything likely to damage the cotton,

such as loose matches, waste, oils, filth, etc., and [should] have the end windows of the cars closed, stripped, and sealed in a proper manner," and that when the cars had been loaded, the Farmers' Union Warehouse should cause the doors thereof to "be also closed, sealed, and stripped in a proper manner." There was also introduced in evidence an agreement between the railway company and the Farmers' Union Warehouse that the former should pay the latter stipulated amounts for its services in loading the cars. There was no evidence that any bill of lading was issued for the cotton to the warehouse company, or to the shipper. There was no evidence that the railroad company had been notified after the loading of the car that it was ready for shipment, but the evidence is undisputed that the bales of cotton were marked for destination, and that the cotton was to be shipped by the first freight train passing on the next day; that the custom of the company was to deliver the cars to an adjacent entrance into the warehouse, for the purpose of having the warehouse agents load the cotton thereon; that this cotton was loaded on the car which the railway company placed there on the day the cotton was burned; and the value of the cotton was proved.

Under this evidence the attorney for the railroad company contends, (1) that there was no delivery of the cotton to the railway company in its capacity of a common carrier, nor any delivery to it as a warehouseman; and (2) that there was no evidence whatever that any spark from a passing engine consumed the cotton, or that it was destroyed by any negligence of the railway company or its agents.

1. Did the facts show delivery to the railway company, and, if so, was that delivery to the company as a common carrier, or as a warehouseman? Of course, if it was delivered to the railway company in its capacity of a common carrier, the plaintiff was entitled to recover upon proof of ownership, delivery, and loss. The question is not free from doubt, but our opinion is that, under the law, the facts show a delivery to the railway company as a common carrier. The Civil Code (1910), § 2730, declares that "the responsibility of the carrier commences with the delivery of the goods, either to himself or his agent, or at a place where he is accustomed or agrees to receive them." Whom did the warehouse company represent in loading the cotton on the car? Did it represent the rail-

way company, or the owner of the cotton, or both? It was unquestionably the agent of the owner in receiving the cotton into its warehouse, but it seems to us plain that it was the agent of the company in loading the cotton from the warehouse on the company's car. The company, by a written contract, created this relationship between it and the warehouse company, so far as the loading of the cotton was concerned. It stipulated that the loading was to be done by the warehouse company, and how it was to be done, and it had agreed to pay the warehouse company compensation for the work of loading the car. In addition to this, it seems to us, from the fact that the car was placed by the railway company near the warehouse, where it was accustomed to place it, and where it had agreed to place it for the warehouse, for the purpose of having it loaded by the warehouse agents with cotton for shipment, that when the cotton was loaded on the car at that place, it was a delivery to the railway company. When the cotton got out of the warehouse and into the car of the railway company, it got into the control and custody of the railway company, and out of the control and custody of the warehouse company. We think the delivery in this case, under the facts, was an actual delivery, and that it was accepted by the railway company. Certainly there was such constructive and implied delivery and acceptance as would make the railway company liable as a carrier.

It is insisted that there was no complete delivery, because there was something else for the shipper to do, and that no bill of lading had been issued by the company, and that there could not be, in law, a complete delivery until a bill of lading had been issued. The responsibility of the company as a carrier began with the completion of the delivery by the warehouse company, whether a bill of lading had or had not been issued at that time. 4 Elliott on Railroads, § 1403, and citations. In this case the bill of lading, according to the evidence, was to have been delivered to the warehouse company for the shipper. The evidence does not disclose who was to pay the freight on the cotton, or whether or not the freight had been paid. Indeed, it fails to disclose anything that the shipper was required to do, except to put the cotton into the hands of the warehouse company, marked for transportation, depending upon the warehouse company and the railway company to load the car and complete the transportation. Where cattle have

been placed in the company's pen for immediate shipment, and part of them have actually been loaded on the cars, the cattle are in the custody of the company as a carrier, and not as a warehouseman. 4 Elliott on Railroads, § 1404, and citations.

In the view we take of the case, it makes little difference whose agent the warehouse company was, whether that of the shipper or of the railway company, for we think the placing of the car by the company at the warehouse, and the loading of the cotton on the car marked for its destination and for immediate shipment, constituted a delivery and acceptance by the railway company as a common carrier. The evidence is undisputed that the cotton was to be shipped the next day, on the first freight train, the very first opportunity for shipment. This, in our opinion, makes an immediate shipment in the meaning of that term, for it was to be shipped on the very first train of the company that passed Metter after the car had been loaded, on the morning of the next day. It has also been held that goods stored along the line of a railway company awaiting shipment, where the owner is to load them when he gets a car, are not delivered to the company *until* they are so loaded and ready for shipment. In the case of *Fleming v. Hammond*, 19 Ga. 145, it was held that, "if the owner of a boat directs cotton to be left at a particular landing on the river, agreeing to receive it there, a deposit of the cotton at that place constitutes a good delivery." It was held in *Packard v. Getman*, 6 Cow. (N. Y.) 757 (16 Am. Dec. 475), that "where a railroad company furnishes a car for the purpose of being loaded, and assents to the placing of goods therein, the goods are as much in the possession of the company as if they had been delivered in its warehouse for shipment, and the company is liable where they are thereafter destroyed by fire, though it occurs before a bill of lading has been signed." See, also, to the same effect, *East Line R. Co. v. Hall*, 64 Tex. 620. In 5 Amer. & Eng. Enc. of Law, 190, it is said that "it is sufficient for the plaintiff to show that the goods were delivered to a person and at a house where goods were accustomed to be left for the carrier." "Delivery to a drayman, or other servant of the company who is accustomed to collect and receive goods for the company at the places of business of its patrons, is a delivery to the company." 4 Elliott on Railroads, § 1406.

It is insisted by learned counsel for the railway company that

the company had no notice, either actual or constructive, of the delivery of the goods. If the deposit is made in the usual manner, at the place where goods have been constantly received for transportation, a railroad company may, it seems, be charged with constructive notice, even though the delivery was not made to any of its servants. The evidence in this case shows that the cotton was delivered at the place where the railroad company was accustomed to receive it. It was delivered on one of its own cars. On the very day on which the cotton was consumed the car had been taken by the railroad company and placed in front of the warehouse for the purpose of having it loaded with the cotton, and the loading was to be done by agents of the warehouse company, which the railway company had in writing constituted its agent for that purpose. These facts bring it squarely within the principle of the ruling that where a railroad company had erected a platform on which, in the usual course of business, cotton was stored for shipment by the next train, and the cotton was destroyed by fire set by one of the company's locomotives, the shipper could recover as from a carrier. And where it was the custom to deposit cotton in the street beside the railroad company's platform, or in the company's cotton yard, a delivery there was held sufficient. 4 Elliott on Railroads, § 1411. It is needless to cite other authority, for, under the authorities already cited, applied to the facts of this case, it must be conceded that the cotton, when it was consumed by fire, was in the possession of the railroad company, having been delivered and received by it as a common carrier for immediate transportation. This conclusion having been reached, it is of course unnecessary to consider the other question, for the railway company as a common carrier is liable for the full value of the cotton consumed by fire while in its possession, unless the fire was caused by the act of God or the public enemy.

Judgment affirmed. Pottle, J., not presiding.

3352. CASE THRESHING MACHINE CO. v. DONALSON.

This case is fully controlled by the decision of this court in *Maine v. Howell*, 7 Ga. App. 311 (86 S. E. 804). The case of *Cable Piano Co. v. Hancock*, 2 Ga. App. 73 (58 S. E. 319), is distinguishable from the present case on the facts.

DECIDED JANUARY 30, 1912.

Complaint; from city court of Bainbridge—Judge Harrell. March 17, 1911.

The J. I. Case Threshing Machine Company sued John E. Donalson for the price of machinery alleged to have been sold to him under a written contract. The allegations of the petition, so far as material, are as follows: Defendant, on June 15, 1909, executed and delivered to plaintiff his written contract (a copy of which is attached as an exhibit) whereby he purchased certain machinery described therein, which was to be shipped to him at Jakin, Georgia. The machinery was shipped to Jakin, according to the terms of the contract. By the terms of the contract Donalson agreed to receive the machinery described therein, on the cars, on arrival at Jakin, to pay freight and charges thereon, and to pay to the order of petitioner \$172 in cash, and to execute notes for the balance of the purchase-price; and if he should fail to make the cash payment or to execute and deliver the notes for the deferred payments, the written order or contract should, at the option of the plaintiff, "stand as the purchaser's written obligation, having the same force and effect as notes and mortgage," and the whole amount of the purchase-money should become due and payable, and the plaintiff should "stand discharged from all warranty." It is alleged that the plaintiff discharged its part of the contract, but that the defendant failed to execute and deliver the notes as agreed, and that the full purchase-price of the machinery is therefore due, to wit, \$472 and interest, besides \$56 freight. By amendment it is alleged that the machinery described in the contract was shipped to Jakin, Georgia, and was there tendered by the plaintiff to the defendant.

The defendant filed a demurrer, setting up, in effect, that the contract was unilateral; that it had not been signed by the vendor, although it was provided by the express terms of the contract that it should be signed by both parties thereto before the machinery was shipped; and that the machinery was shipped against the defendant's consent, and he refused to accept it on its arrival at Jakin. The demurrer was sustained and the petition dismissed, and the plaintiff excepted.

The contract upon which suit is based was signed by John E. Donalson, the defendant. It is an order addressed to the J. I. Case Threshing Machine Company, Racine, Wisconsin, and re-

quests the company to ship, on or before the 15th day of June, 1909 (or as soon thereafter as transportation can be furnished), to Jakin, Georgia, or other convenient station in the State of Georgia, to the undersigned purchaser, the machinery described in the contract. It provides that "this order must be signed by all parties before delivery of goods," and that the order "is taken subject to approval, and is to be sent to the company for acceptance or rejection." It sets forth the purchase-price and provides for terms of payment, and contains this condition: "If purchaser fails to pay said money or to execute and deliver said notes and mortgage (properly filed or recorded), it is agreed, as a condition hereof, that the title to said goods shall not pass, and this order shall, at the company's option, stand as the purchaser's written obligation, having the same force and effect as notes and mortgage for all sums not paid in cash, and the whole amount of purchase-money shall be due and payable, and the company stand discharged from all warranty." The contract contains warranties as to the kind and character of the machinery, and other mutual terms and conditions, and provides that if the purchaser "fails or refuses to accept said machinery upon its arrival as above specified, or in case he cancels this order, he will pay said company the freight and charges on said machinery from the factory to the place of delivery as above provided, and freight for its reshipment, and in addition thereto will pay 15 per cent. of the contract price, which it is hereby agreed shall constitute the liquidated damages for such breach of contract."

J. C. Hale, for plaintiff.

Erle M. Donaldson, for defendant.

HILL, C. J. (After stating the foregoing facts.) The suit is not for breach of contract, but for the purchase-price of the machinery, the petition alleging that the plaintiff fully performed its part of the contract; and the only question presented for the decision of this court is whether the allegations of the petition, if proved, entitle the plaintiff to recover the agreed price of the machinery. This case seems to be fully controlled by the decision of this court in *Maine v. Howell*, 7 Ga. App. 311 (66 S. E. 804). Indeed, we think that it is even stronger and clearer as to the right of the plaintiff to recover than the case just referred to. In that case it was held that where A., by a written order, bought from B. \$180 worth of goods and merchandise, and B., on receiving the order, executed

it by shipping the goods covered by it to A., the contract was not within the statute of frauds, and was mutually binding. Here the contract was signed by the defendant himself, and this written order was sent directly to the plaintiff for acceptance and performance. In the case cited the contract, as in the present case, provided that it was not to be binding unless it was signed by the parties thereto, and there was no written acceptance of the order by the plaintiff, but, on the receipt of the order, the plaintiff executed the contract by filling the order according to its terms, and in the opinion this court says: "This was the very highest form of acceptance."

It is insisted that the plaintiff was not bound by the express warranties unless the contract was actually signed by it. We do not concur in this view. When the plaintiff performed the contract according to its terms, this was an acceptance, and it followed that the plaintiff was thereupon bound by all the warranties, terms, and conditions contained in the contract, just as the defendant was also bound. The plaintiff having, therefore, accepted and performed the contract according to its terms, the defendant was bound on his part to accept the machinery, unless there was some breach of the warranties contained in the contract. He could not arbitrarily refuse to accept the machinery, which had been shipped to him by the plaintiff according to his order and tendered to him at the very point of destination to which he had directed that it be shipped and delivered. It is not necessary for the party to whom the order is addressed to accept it in writing (although it be expressly stipulated that it should be so accepted), if it is signed by one of the parties and is acted on by the other party. Under these circumstances it is as binding as if signed by both parties. *Voegel v. Peacock*, 157 Ill. 339 (42 N. E. 386, 30 L. R. A. 491); *Sellers v. Grier*, 172 Ill. 549 (50 N. E. 246, 40 L. R. A. 591); 9 Cyc. 270. See also *Shepard v. Daniel Miller Company*, 7 Ga. App. 760 (68 S. E. 451); *Sheffield v. Whitfield*, 6 Ga. App. 762 (65 S. E. 807). In the *Sheffield* case, *supra*, Judge Russell uses the following language pertinent to the question now under consideration: "An offer may be accepted . . . either by a promise to do the thing contemplated therein, or by the actual doing of the thing." In *Brown v. Bowman*, 119 Ga. 153 (46 S. E. 410), it is held that "though a promise may be a nudum pactum when made, because the promisee is not

bound, it becomes binding when he subsequently furnishes the consideration contemplated, *by doing what he was expected to do.*" Chief Justice Fish, in the course of the opinion, uses the following language: "A contract is often such that, until something is done under it, the consideration is imperfect, yet a partial performance, or a complete performance on one side, supplies the defect. If, for example, one promises another, who makes no promise in return, to pay him money when he shall have done a specified thing, if he does it, not only is the contract executed on one side, but also the consideration is perfected and payment can be enforced" (citing numerous authorities). "A promise may be unenforceable for want of mutuality when made, yet the promisee may render it valid and binding by supplying a consideration on his part before the promise is withdrawn." This doctrine is well settled by many adjudged cases cited by text-writers.

It therefore seems perfectly clear that when this offer was signed by Donalson and sent directly to the J. I. Case Threshing Machine Company for its acceptance or rejection, and the company accepted it by executing it according to its terms, the offer became a contract fully completed and mutually binding; and when the company performed its part of the contract and shipped to the defendant, as directed, the machinery therein described, and tendered delivery to him at the point of destination, he not having withdrawn his proposition before the contract was fully executed by the plaintiff, he could not without cause refuse to accept the machinery. He was bound then to accept it and to pay for it as agreed, unless some of the warranties relative to the machinery were breached.

The case of *Cable Piano Co. v. Hancock*, 2 Ga. App. 73 (58 S. E. 319), relied upon by the defendant, is distinguishable from the present case on the facts. In that case the offer to buy the piano described in the written contract was signed by the defendant and delivered to the plaintiff's salesman, who turned it over to the company's office for acceptance. The piano had already been delivered into the possession of the defendant for trial, subject to his approval, and to be paid for when the contract was accepted by the Cable Piano Company. Before the Cable Company accepted the contract, the defendant tendered back the piano, telling the plaintiff that he had decided to cancel the order. Judge Powell, in delivering the opinion of the court, expressly states that "the delivery

of the piano under the contract, and acceptance thereof by the buyer, would have been sufficient to make the contract complete. The buyer's custody of the piano, under the circumstances stated, however, did not have this effect." And it was held that under the facts of that case the contract never became mutual, because the proposed buyer had a right to withdraw his consent thereto before acceptance by the seller, and he exercised this right before the seller accepted the contract. There is nothing in this decision that is in conflict with what is herein decided. For the reasons stated, we conclude that the court below erred in sustaining the demurrer and in dismissing the petition.

Judgment reversed. Pottle, J., not presiding.

3464. RICKS v. BRIESNICK.

RUSSELL, J. The verdict rendered not being demanded by the evidence, the discretion of the trial court upon the first grant of a new trial will not be controlled.

Judgment affirmed. Pottle, J., not presiding.

DECIDED JANUARY 30, 1912.

Action for money had and received; from city court of Brunswick—Judge Krauss. February 24, 1911.

J. D. Sparks, J. T. Powell, for plaintiff in error.

Harry F. Dunwody, contra.

3472. METROPOLITAN LIFE INSURANCE CO. v. MORROW, for use, etc.

RUSSELL, J. 1. An amendment making a nominal plaintiff, who sues for the use of the party originally named as plaintiff, does not make a new party. It merely truly characterizes the original plaintiff. A usee unable to maintain an action in his own name may enforce his rights in the name of his assignor, suing for his use; and an amendment to this effect did not change the cause of action nor add a new and distinct party plaintiff. *A., K. & N. Ry. Co. v. Smith*, 1 Ga. App. 163 (58 S. E. 128); *Chapman v. Taliaferro*, 1 Ga. App. 238 (58 S. E. 128).

2. One who, for a valuable consideration, divests himself of the right to receive money due him, and vests this right in an assignee or transferee, can not, without the consent of his assignee, reinvest himself with the

right to receive it. Nor can a debtor of the assignor, who has notice of the assignment, pay the debt to the assignor except at his own peril. "It is the established rule in the United States that an assignment for a valuable consideration, with notice to the debtor, imposes on him an equitable and moral obligation to pay the assignee." 2 Am. & Eng. Enc. of Law (2d ed.), 1097.

3. The cause of action depending, according to the allegations of the petition, upon the statement that the defendant had notice of the assignment, the court did not err in overruling the demurrers.

Judgment affirmed. Pottle, J., not presiding.

DECIDED JANUARY 30, 1912.

Action on insurance policy; from city court of Atlanta—Judge Reid. April 7, 1911.

Smith, Hammond & Smith, for plaintiff in error.

Paul L. Lindsay, contra.

3489. BALCHIN v. JONES.

1. It is only when the terms descriptive of property intended to be conveyed by a written instrument are manifestly too meager, imperfect, or uncertain to serve as adequate means of identification that the court can, as a matter of law, adjudge the description to be insufficient. "Whether such terms will serve to identify the premises is a question of fact, and not of law."
2. Parol evidence is admissible in aid of a defective description of personal property in a bill of sale.
3. Failure to record in time may subject the holder of a bill of sale to the risk of loss by reason of the superior diligence of the holder of some junior lien created by contract, but if he really has obtained title prior to the creation of a lien by law, his title will not be defeated by the mere failure to record. It is not essential to the validity of a reservation of title embraced in a written contract for the sale of personalty that the contract be recorded. A bill of sale may be admissible as evidence though it has not been recorded; and especially is the failure to record not a good ground of objection to its introduction when there is evidence that actual notice of it was brought home to the party sought to be affected by the instrument.
4. The court did not err in overruling the objection as to the attestation of the bill of sale. Inasmuch as the specific objection was not made that the bill of sale was inadmissible for want of proof of proper execution, the necessity for such proof was waived. Furthermore, the admission, in the petition for certiorari, that the bill of sale was signed by the parties to whom it purported to have been executed must be treated as an abandonment of the objection, upon the hearing in the superior court.

5. The requirement of § 4203 of the Civil Code (1910), as to attestation, is merely a provision for the admission of the paper to record.

DECIDED JANUARY 30, 1912.

Certiorari; from Elbert superior court—Judge Meadow. April 29, 1911.

Worley & Nall, for plaintiff. *C. P. Harris*, contra.

RUSSELL, J. H. F. B. Paddock owed J. J. Balchin an open account, and, absconding, left certain personal property in Elbert county. After Paddock had absconded Balchin procured the issuance of an attachment, which was levied on certain personal property of Paddock's, described in the attachment. Later a special judgment was entered on this attachment, in favor of Balchin against Paddock, but it does not appear that there was any record of the execution. Jones, the defendant in error, had procured a bill of sale from Paddock, by which the latter, for the purpose of securing an indebtedness of \$500, due by him to Jones conveyed "a full and complete title" to Jones, his heirs and assigns, to "the following property, to wit: all household furniture, pictures, stove and kitchen utensils, wash pot, tubs, canned fruit, sewing machine, harness, fodder, oats, etc., and all articles not mentioned in the above; also the following in office: drugs, books, instruments, etc., with the exception of desk and book-case, property of Tunnison & Co., and a certain amount of instruments, property of Dr. J. Matthews." The contract of sale recited that "this deed is made and executed in pursuance of the provisions of § 2771 et sequitur of the Civil Code of 1895," and purported to be signed also by Beulah D. Paddock, and to have been executed in the presence of John T. Fagan, "Commissioner of Deeds, Troy, New York" (as evidenced by that officer's certificate), in January, 1910. The fact that it bore evidence of having been recorded is immaterial, because the entry of the clerk shows that it was put to record after the suing out of the writ of certiorari in this case. Balchin's attachment, based upon the ground that Paddock "absconds," was, on October 15, 1910, levied on certain household effects, and also on certain drugs, books, and instruments, such as were referred to in the bill of sale to Jones, as well as on some articles minutely described in the levy, which were not claimed. Upon the levy of the attachment Jones filed a claim to such of the property as was apparently within the descriptive terms employed in the bill of sale. He interposed

no claim to several articles mentioned in the levy. Jones's claim of title was based on the bill of sale before mentioned. On the trial of the claim case the jury in the justice's court found the property not subject to the lien of the attachment, and Balchin's certiorari, complaining of error in the justice's court, was overruled. He excepts to this judgment of the superior court, and assigns error upon each of the grounds upon which error was assigned in the petition for certiorari. As the errors assigned on the judgment overruling the certiorari comprise the errors alleged to have been committed on the trial of the claim case in the justice's court, and pertain to the admission of testimony, it is perhaps proper that we shall state briefly the contentions of the plaintiff in error as to the several rulings complained of.

1. The first objection urged by the plaintiff below against the admission of the bill of sale which we have quoted was that the description of the property intended to be conveyed was insufficient to serve as means of identification, so as to make the instrument a valid conveyance. In support of this contention he cites § 3257 and § 4186 of the Civil Code (1910); *Thomas Furniture Co. v. T. & C. Furniture Co.*, 120 Ga. 882 (48 S. E. 333); *Broach v. O'Neal*, 94 Ga. 475 (3), (20 S. E. 113). We do not think that the contention is sustained by the authorities cited; indeed, it appears to be without merit. When the description is aided by parol evidence, explanatory of the terms used in the bill of sale, it is such as to prevent the instrument from being void because of insufficiency in the description of the property conveyed. See *Beatty v. Sears*, 132 Ga. 516 (64 S. E. 321); *Duke v. Neisler*, 134 Ga. 594 (68 S. E. 327). In *Broach v. O'Neal*, supra, cited by counsel for the plaintiff in error, it was held that "it is only when a description of the premises is manifestly too meager, imperfect, or uncertain to serve as adequate means of identification that the court can adjudge the description insufficient as matter of law." In *Patterson v. Evans*, 91 Ga. 799 (18 S. E. 31), in which mortgaged premises were described in these terms: "two hundred and ninety acres, more or less, of land situate in the fifth district of Wilkinson county, upon which an encumbrance of \$125 exists, due October 15, 1888, taking priority of this mortgage; also two gins and one grist-mill located on said described land," the description was held to be "very meager and vague," but it was ruled that "whether such

terms will serve to identify the premises is a question of fact, and not of law" (citing *Collier v. Vason*, 12 Ga. 441, and *Oatis v. Brown*, 59 Ga. 711), and that it could not be held, as a matter of law, that the description given was so defective as to render the mortgage void. See, also, *Cherry Lake Turpentine Co. v. Lanier-Armstrong Co.*, ante, 339.

2. But even if the description in the bill of sale was defective, parol evidence was admissible in aid of the description. *Thomas Furniture Co. v. T. & C. Furniture Co.*, supra. In the first head-note of that decision it is said that "In providing that a mortgage or a conditional bill of sale shall specify the property on which it is to take effect, the law does not require such a description as will serve to identify the property without the aid of parol evidence." There was, therefore, no error in the admission of parol evidence in aid of the description contained in the bill of sale.

3. Balchin's next ground of objection to the admission of the bill of sale in evidence was that "the plaintiff's lien on the property claimed dated from the levy of the attachment; and the bill of sale, not having been recorded before the date of the levy, nor even at the time of the trial of the claim case, could not and would not put plaintiff on notice of claimant's interest in the property claimed, based on said bill of sale, and should not be admitted to defeat plaintiff's lien, which was established before the record of said bill of sale, plaintiff's lien having been established by operation of law and not by contract." We see no error in overruling this objection. Under the terms of the Civil Code (1910), § 4208, the recording of a bill of sale is not compulsory; it is merely permissive. The failure to record in time may subject the holder of a bill of sale to the risk of loss by reason of the superior diligence of the holder of some junior lien created by contract, but if he really has obtained title prior to the creation of a lien by law, his title will not be defeated by the mere failure to record. *Donovan v. Simmons*, 96 Ga. 340 (22 S. E. 966). In the case at bar the plaintiff had a judgment on an attachment, and this judgment had never been entered upon any execution docket of the county; and, as already stated, Jones's bill of sale had not been recorded; so neither party's rights were dependent upon the record. In the *Donovan* case, supra, the execution, issued on the judgment against James, was entered on the general execution docket on April 19, 1893, and the

deed from James to the claimants was not filed for record for more than six months thereafter, nor until November 22, 1893. In the instant case the lien of the attachment dated from the levy on October 15, 1910, after Jones's bill of sale was given (if at all) on January 4, 1910. The failure to record the bill of sale afforded no meritorious ground of objection to its admissibility, and, under the ruling in the *Donovan* case, *supra*, "while the failure to record such a deed might operate to defeat the conveyance as to one who purchased subsequently of the same vendor without notice of the prior conveyance, a judgment obtained against the grantor subsequently to the conveyance, but entered upon the general execution docket prior to the record of the deed, would not, merely by virtue of such entry, become a lien upon the property previously conveyed." Furthermore, in the present case there was evidence that Balchin, before he sued out his attachment, had actual notice of the bill of sale held by the defendant, and it would seem that actual notice would be as effectual and binding on the plaintiff as the constructive notice afforded by the recording of the bill of sale. In *Cottrell v. Merchants Bank*, 89 Ga. 508 (15 S. E. 944), it was held that "The retention of title by the vendor in a written contract of sale of personal property, with the condition affixed that the title is to remain in the vendor until the purchase-price shall have been paid, though the instrument be not recorded within the time prescribed by law, will prevail over the lien of a subsequent mortgage on the same property, executed by the conditional vendee to a creditor who gives credit and takes the mortgage without notice of the vendor's title, the mortgage also not being recorded in time." In ruling on the point Justice Simmons held, that "Where both parties fail to record, both are lacking in the diligence required by law as a condition for their protection. Neither can claim a better right because the other neglected to record. The law puts them on precisely equal terms in this respect. Neither having complied with the requirement to register, they are left where they would have stood regardless of the registry statutes. Consequently the first in time must prevail. The same considerations in justice apply to the case of a vendor reserving title; and it suffices to say that the statute manifestly intends to put him on the same ground as a mortgagee of personality." Justice Simmons cites the case of *Steen v. Harris*, 81 Ga. 681, as authority, and the facts of that case are very similar to

those in the case at bar. In that case a conditional bill of sale, under which title was reserved in a piano, had not been recorded. The piano was levied upon under an attachment, at the instance of a creditor whose debt was not made on faith of the property, and the levy was made after the conditional sale had been rescinded by agreement. The rescission terminated the relation of conditional vendor and vendee before the attaching creditor levied on the property, and it was held that "The court erred in granting a new trial, setting aside the verdict finding the property not subject, for the reason that the verdict rendered was warranted by the evidence." In *Hill v. Ludden*, 113 Ga. 320 (38 S. E. 752), it was held that it was not essential to the validity of a reservation of title embraced in a written contract for the sale of personalty that the contract be recorded. The objection of the present plaintiff in error upon this point, as made in the court below, was not, strictly speaking, a proper objection to the admissibility of the bill of sale, but was rather an argument against its priority, and was properly overruled.

4, 5. The objection urged by the plaintiff in error to the attestation of the bill of sale, that it was inadmissible because it purported to have been witnessed by a "commissioner of deeds, Troy, New York," whereas the law required that it be executed before a commissioner of deeds for the State of Georgia, seems to be without merit. The only objection was to the attestation. No objection based upon the ground that the execution of the instrument in question had not been proved was made, and, by the failure to object, proof of the execution was waived. *Bowen v. Frick*, 75 Ga. 786 (3-b). In that case it was held that the proper exception to be taken to the introduction of the notes was an objection that they were inadmissible for want of proof of execution, and, this specific objection not being made, the necessity for such proof was waived. See, also, *Anderson v. Cuthbert*, 103 Ga. 771 (30 S. E. 244), where the *Bowen* case is cited, and it is said that "failure on the part of the defendants to object to the introduction of the paper in evidence would amount to a waiver of the necessity of proof of its execution, for the purpose of its admission in evidence." The objection which should have been made was that the execution of the instrument had not been proved. The objection actually made only raised the point that the person purporting to attest the execu-

tion was not a subscribing witness of such a kind as required by law to entitle the bill of sale to registry. Furthermore, in the petition for certiorari, it is admitted that this bill of sale was signed by H. F. B. Paddock and Beulah Paddock; and this admission in *judicio* would seem to have been so binding upon the plaintiff as to have amounted to an abandonment of this objection, on the hearing before the judge in the lower court. The law relative to the execution of deeds and mortgages out of this State provides that in order to admit such a paper to record, it shall be attested as provided in section 4203 of the Civil Code (1910). The claimant did not contend, in the trial in the court below, that the bill of sale had been recorded. As a matter of fact, it had not been recorded, and, therefore, the exception that the attesting witness was not such a one as would have authorized the registry of the bill of sale did not go far enough to amount to a contention that the bill of sale had not in fact been executed so as to convey the title of the vendor to the vendee, even though it might not have been so attested as to convey notice to third parties.

The objection that the bill of sale was void on its face, because signed by the wife as security for her husband, is not insisted upon in the brief of counsel for the plaintiff in error, and therefore must be treated as abandoned.

An objection was interposed to testimony on the part of the claimant that he had told Balchin, before the levy of the attachment, that he, Jones, held the bill of sale in question. The objection urged to this testimony was that the only notice which, under the law, could or would be binding on the plaintiff, under the facts of the case, or that could defeat his lien on the property claimed, would be notice given by the record of the bill of sale, and proof of any other notice than that of the record was inadmissible in evidence on the trial of the case then before the jury. As we have already ruled that the rights of Jones, under the bill of sale, if it was in fact executed prior in date to the levy of the attachment, would not be affected by the fact that the bill of sale had or had not been recorded prior to the levy of the attachment, neither the objection nor the ruling upon it would seem to be material in a proper decision of the case. The decision in the *Donovan* case, *supra*, is conclusive upon the point that the registry act of 1889 worked no change in the existing law as to the priority of liens ac-

quired by law, in a contest with prior rights acquired by contract. But if the matter is one of any materiality, the rulings in *Hill v. Ludden*, supra, and *Cottrell v. Merchants Bank*, supra, would at least sustain the conclusion that the admission of evidence of actual notice was not harmful to the plaintiff in error; for the reason that the actual notice would seem to be as binding on the plaintiff in attachment as would have been the constructive notice afforded by the recording of the bill of sale.

Judgment affirmed. Pottle, J., not presiding.

3518. SUMMERS v. LEE, for use, etc.

- RUSSELL, J. 1. The court erred in disallowing the defendant's plea of set-off. "If the plaintiff sues for the benefit of another person, a set-off against the beneficiary shall be allowed." Civil Code (1910), § 4343.
2. There being sufficient evidence to authorize the inference that the making of the note and the deed by the wife, to secure a loan to her, was merely a colorable scheme by which her separate estate was to be subjected to the debts of her husband, it was error to direct the verdict for the plaintiff. Even if the evidence could be said to preponderate in favor of the plaintiff, the verdict directed was not demanded; for there was testimony upon which the jury might have found that the plaintiff advanced the money knowing that it was to be used to pay the husband's debts, including his debt to the bank, and that the entire transaction was a collusive scheme, by which the statute against suretyship on the part of married women might be evaded. *Central Bank v. Almand*, 135 Ga. 231 (69 S. E. 111); *McLeod v. Southern Fertilizer Co.*, 7 Ga. App. 322 (66 S. E. 802).

Judgment reversed. Pottle, J., not presiding.

DECIDED JANUARY 30, 1912.

Complaint; from city court of Atlanta—Judge Callioun. March 18, 1911.

A. C. & J. H. McCalla, Munday & Cornwell, for plaintiff in error.
R. W. Milner, contra.

3621. STEWART v. THE STATE.

RUSSELL, J. It appearing, without contradiction, from the evidence of the prosecutor that his money was taken with his knowledge, the conviction of the plaintiff in error of the offense of larceny from the person is not sustained, and a new trial should have been granted. *Moye v. State*, 65 Ga. 754; *Jackson v. State*, 116 Ga. 578 (42 S. E. 750); *Williams v. State*, 70 S. E. 890 (9 Ga. App. 170).

Judgment reversed. Pottle, J., not presiding.

DECIDED JANUARY 30, 1912.

Indictment for larceny; from Fulton superior court—Judge Roan. June 10, 1911.

R. J. Jordan, for plaintiff in error.

Hugh M. Dorsey, solicitor-general, contra.

3806. FORD v. THE STATE.

1. A violation of the statute which forbids one to be drunk or intoxicated within the curtilage of any private residence not in his exclusive possession may be manifested by his indecent condition or acting. The indecent condition may exist in the degree of the intoxication, even if there be no harmful act and no unbecoming language or loud and violent discourse.
2. The evidence authorized the verdict of guilty.

DECIDED JANUARY 30, 1912.

Accusation of misdemeanor; from city court of Valdosta—Judge Cranford. October 13, 1911.

G. A. Whitaker, S. M. Varnedoe, for plaintiff in error.

James M. Johnson, solicitor, contra.

RUSSELL, J. The only question presented by this record is whether the mere fact that the defendant went to the private dwelling-house of another in such an intoxicated condition that, in attempting aimlessly to grab at a little child, he fell in the middle of the floor, and, without resistance, was ejected, authorized his conviction under § 442 of the Penal Code. It is contended that there can be no violation of this section (which forbids any person's appearing in an intoxicated condition on any public street or within the curtilage of any private residence), unless the intoxication is made manifest by some act or language on the part of the intoxicated person. Counsel cite the rulings of this court in *Coleman v. State*, 3 Ga. App. 298 (59 S. E. 829), *Dorsey v. State*, 7 Ga.

App. 366, 372 (66 S. E. 1096), *Haines v. State*, 8 *Ga. App.* 631 (70 S. E. 84), in support of this position. There is no ruling in any of these cases upon the precise point here presented, and certainly nothing that conflicts with the view that the language declaring that the intoxicated condition may be manifested by indecent condition is for any reason to be disregarded. In the *Coleman* case, *supra*, it is true that the defendant was shown to have been guilty of using profane language and of doing other acts which clearly demonstrated that he was drunk; and, in the opinion, Judge Hill was dealing with the facts as presented. But the statement that "the purpose of the statute is to protect the public streets and highways and private residences not so much from the presence of the drunkard as from the conduct of the drunkard, as described in the act," can not be construed as a ruling directed in any sense to that portion of the statute which declares that the intoxication may be manifested by indecent condition alone; for, in commenting on the evidence, Judge Hill states that in the case under discussion, the plaintiff in error "made clearly manifest his drunken condition by boisterousness, by *indecent condition* and acting, and by loud and violent discourse." The *Coleman* case was one in which the numerous acts of the defendant overshadowed any reference to his condition and pretermitted any necessity for reference to that portion of the statute, but there is certainly nothing said in the opinion that could warrant the conclusion that the intoxication forbidden by the statute might not be manifested by the indecent condition of the accused, without anything more being shown. The same is true as to the comments of the writer in *Dorsey v. State*, *supra*. The statement in the *Dorsey* case, that "one may be intoxicated without violating the statute, provided he is guilty of no act which violates public decency," is not exclusive of such an act as would be committed if one went to the private dwelling-house of another in such a condition of beastly intoxication as to violate every rule of decency and propriety. The going is an act. The appearing within the curtilage of a dwelling-house is an act on the part of the person who appears, and the indecency would depend largely upon the degree of the intoxication. The intoxication might, of itself, be so complete as to evidence an "indecent condition."

In the *Haines* case, *supra*, reference was made to the specific

charge upon which the defendant was being tried, and to the fact that one of the acts specifically mentioned in the statute was the use of vulgar, profane, and unbecoming language; but in a subsequent portion of the opinion the writer said, that "to appear in an intoxicated condition in any portion of the area enclosed by the curtilage, whether within or without the dwelling-house, is a violation of the statute." It is true that the question then under discussion was whether the law penalized drunkenness in a dwelling-house, inasmuch as the language used in the statute was, "within the curtilage of any private residence," but the language quoted from the decision clearly indicates the opinion of this court that it was the intention of the legislature to penalize the appearance of any one so intoxicated as to be in any way offensive, by reason of such intoxicated condition, to others at any dwelling-house not his own. In the opinion of the writer, laws directed against the abuse of intoxicants can not be too strictly enforced. The writ of error is without merit.

Judgment affirmed. Pottle, J., not presiding.

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3862. TOLES *v.* THE STATE.

1. It is a violation of the law for a person to keep on hand intoxicating liquors at his place of business when it is closed, as well as when it is open to the public for the purpose of business.
2. As all engaged in the commission of a misdemeanor are principals, one may be guilty of keeping intoxicating liquor at his place of business, or on hand at the place of business, though it be disclosed by the evidence that he was not the owner of the liquor, but merely kept it on hand as an employee or agent of the owner, at the place of business where he worked, provided that it was a public place of business.
3. In contemplation of the general prohibition law, even a menial employed by another may have a place of business. His business may consist only of discharging the duties devolving upon him under the terms of his employment; and the place of business of his employer will be his place of business if it be the place where the performance of his duties is required.
4. The evidence authorized the verdict.

DECIDED JANUARY 30, 1912.

Accusation of misdemeanor; from city court of LaGrange—Judge Harwell. November 2, 1911.

E. R. Bradfield, E. A. Jones, M. U. Mooty, for plaintiff in error.
Henry Reeves, solicitor, contra.

RUSSELL, J. The plaintiff in error was convicted under an accusation charging that he was guilty of unlawfully keeping on hand, at his place of business, alcoholic, spirituous, malt, and intoxicating liquors. Exception is taken to the overruling of his motion for new trial. If the complaints urged therein against the judge's instructions to the jury are well founded, a new trial would result, even though the evidence authorized the conviction of the defendant; and for this reason we shall first consider the merits of the exceptions to the charge of the court.

1. Error is assigned because the court charged the jury as follows: "I charge you that it is a violation of the law for a person to keep on hand intoxicating liquors at his place of business at any time; it is a violation of the law to keep it on hand when it is open to the public for business; and it is a violation to keep it on hand when it is closed. The decision cited by counsel only applies when the place of business is used as a residence and also as a place of business." We find no error in this charge. It is a violation of the law for a person to keep on hand intoxicating liquors at his place of business when it is closed, as well as when it is open to the public for the purposes of business. The evidence in this case showed that at least a portion of the whisky found in the place of business where the defendant worked was placed there in his absence, and after the place had been closed for the night, and this place of business had not been opened the next morning when the officers entered it through the window; so there was no direct evidence that the intoxicants which the officers found had been kept on hand during the hours when the place of business was open. The purpose of the provision of the general prohibition law now under consideration was to prohibit the carrying of intoxicating liquor into a place of business and keeping it on hand during those hours when it was closed, as well as during the hours when it was open. The presence of the intoxicants, either at night or in the day, might afford a pretext by which other violations of the statute would be excused. The ruling in the *Land* case, 5 *Ga. App.* 98 (62 S. E. 665), is not applicable to this case. The ruling in that case dealt with the peculiar facts disclosed by the record, but the dissimilarity between that case and the case at bar is apparent, in that it appeared in that case that there was a portion of the day when Land's place of business was devoted to no other than private

use, being a room used as his sleeping apartment. In the present case there is no suggestion that the pool-room where the whisky was found was closed at night for all purposes other than private use.

2. As all engaged in the commission of a misdemeanor are principals, one may be guilty of keeping intoxicating liquors at his place of business, or of keeping liquor on hand at the place of business, though it be disclosed by the evidence that he was not the owner of the liquor, but merely kept it on hand as an employee or agent of the owner, at the place of business where he worked, provided that it was a public place of business. According to the evidence, Shep Toles, the defendant, was perhaps only an employee of one Yarbrough, employed to run the pool-room and other accessories of the business. It is uncontradicted that none of the whisky found was directed or marked in his name, though all of it was so marked as to indicate clearly an ownership by others. So it is not perfectly plain that the defendant had an interest in the ownership of the whisky. But granting that he had none, there was evidence to the effect that he kept the place of business for Yarbrough; and it is very plain, from the quantity of empty whisky barrels, similar to those found to be full, that Toles not only knew that whisky was being kept at the place of business, but aided as an employee in keeping it on hand.

The point is made that the evidence shows that the pool-room, if a place of business at all, belonged to Yarbrough, and that, being Yarbrough's place of business, it would not be an offense, under the terms of the general prohibition law, for another person (Toles for instance), who merely worked or was employed there, to keep intoxicating liquors on hand there; for the reason that the statute only forbids that one shall keep intoxicating liquors on hand at his own place of business, and if this place of business belonged to Yarbrough, then Toles would violate no law by keeping intoxicating liquor on hand there. Upon this subject we approve the charge of the court, which was as follows: "In order for you to find the defendant guilty, it would not be necessary to show that the defendant was the owner of the liquor which was found, if any was found. If the jury should find, from the evidence, that it was Yarbrough's business, that he was owner of the liquor which was found, if any was found, and if they further find that defendant, as an employee

or agent of Yarbrough, being hired by Yarbrough to run the business, kept intoxicating liquor on hand at this place of business where he worked, and the same was a public place of business, in Troup county, on or about the date alleged in the accusation, he would be guilty of a violation of the law." These instructions follow our ruling in *Hendrix v. State*, 5 Ga. App. 819 (63 S. E. 939), in which we held that "Where the evidence shows that the intoxicating liquor sold or furnished at the place of business in question was in the entire charge of the accused, it is not error for the judge to instruct the jury that if the defendant assented to the furnishing of the intoxicating liquor in question, he might be found guilty." The two cases are so similar that the ruling in the *Hendrix* case is controlling in this.

3. Furthermore, in contemplation of the general prohibition law, even a menial employed by another may have a place of business. His business may consist only of discharging the duties devolving upon him under the terms of his employment, and the place of business of his employer may be his own place of business, if this be the place where his duties are performed.

4. There being no merit in the assignments of error upon the charge of the court, it is very plain that the jury were authorized, under the evidence adduced, to convict the defendant. While it is true that apparently the 16 barrels of whisky found in the pool-room run by him had been shipped to others than himself, and were found marked in their name, and granting that the pool-room where the whisky was found was owned by Yarbrough, still there was evidence that Toles was employed to manage and run the pool-room, and that he did so. The evidence does not disclose whether Toles was jointly interested in the ownership of the whisky, or of the pool-room, or was only an employee, but there are a number of circumstances in the evidence which would have authorized the jury to infer that Toles assented to the keeping of the whisky on hand in his place of business in which he was interested, and certainly that he aided in keeping and furnishing intoxicating liquor at a public place, if, being in charge of this pool-room, as testified, he permitted it to be kept there. The evidence authorized the verdict.

Judgment affirmed.

3863. CENTRAL GEORGIA POWER CO. v. THE STATE.

The special presentment in this case was not subject to the demurrer filed by the defendant, and the court did not err in overruling the same.

DECIDED JANUARY 30, 1912.

Indictment for misdemeanor; from city court of Covington—Judge Whaley. November 2, 1911.

Walter F. Johnson, Greene F. Johnson, for plaintiff in error.

POTTLE, J. A special presentment was returned by the grand jury of Newton county against the Central Georgia Power Company, charging it with a violation of the Penal Code (1910), § 681. The court overruled the demurrer to the presentment, and error is assigned upon this judgment.

The presentment alleged, that the accused, on the 16th day of September, 1911, in the county of Newton, "with force and arms did erect, and did continue, after notice to abate it, a nuisance which tends to annoy the community, and which tends to injure and which does injure the health of the citizens in general, by then and there creating and causing a pond of water to overflow and stand upon an area of land of three thousand acres, which pond contains logs, stumps, limbs, and growing and decaying matter, and is producing malaria, large quantities of mosquitoes, and creating poisons in the air, and causing sickness and disease in the community surrounding said pond in said county." The demurrers were to the effect that the special presentment failed to set out any offense against the law; that it failed to describe the nature and character of the nuisance, or the location of the nuisance; that it failed to set out either literally or in substance the notice to abate, or the person to whom the notice was given, or when the notice was given, and further failed to set out the officer or agent of the defendant company to whom the notice was given; that it failed to describe the character of the poisons in the air, alleged to have been created, or the nature and character of the sickness and disease alleged to have been caused by the nuisance, or who were made sick, or when and where the sickness and disease ensued; that it failed to allege that the nuisance "damages all persons who come within the sphere of its operation;" that it failed to set out the manner in which the pond of water referred to in the presentment was created and caused to overflow; that it failed to describe the pond by boundaries, or

other description, or to identify the particular stream, the obstruction of which caused the pond; that it failed to allege that the malaria and large quantities of mosquitoes in the air injured the health of the citizens in general, and failed to allege that the nuisance complained of is a public nuisance.

We do not think any of the grounds of the demurrer are well taken. Section 681 of the Penal Code, under which the special presentment was returned, is in the following language: "Any person who shall erect, or continue after notice to abate, a nuisance which tends to annoy the community, or injure the health of the citizens in general, or to corrupt the public morals, shall be guilty of a misdemeanor." While the statute makes criminal the erection, or maintenance after notice to abate, of a public nuisance, it is aimed at the particular kind of a public nuisance described in the statute, to wit, one which "tends to annoy the community, or injure the health of the citizens in general, or to corrupt the public morals." The erection, or maintenance after notice, of a nuisance such as is described in this statute is unlawful without reference to whether it is such a public nuisance as is described in the Civil Code (1910), § 4457. An indictment is sufficient which charges an offense in the language of the statute, and in which the acts alleged as constituting the offense are described with sufficient fullness to put the defendant on notice of the offense with which he is charged. *Glover v. State*, 126 Ga. 594 (1), (55 S. E. 592). It is not necessary that the evidence should be set out in the indictment; it is only necessary that the offense should be charged in the language of the code, or so plainly that the nature of the charge can be easily understood by the jury. *Dowda v. State*, 74 Ga. 12 (2). Tested by these rules, we think that the demurrer was properly overruled. The nuisance is described as being a pond located in the county in which the indictment was found, and it is sufficiently alleged how and in what manner this pond has become a nuisance. It was certainly not necessary to describe the particular kind of poisons in the air, or the particular disease or sickness which had been caused in the community surrounding the pond, nor who were made sick. It is earnestly insisted by able counsel for the plaintiff in error that the indictment should have specified and described the particular notice to abate, alleged to have been given, the person by whom it was given, and the person to whom it was

given. It is to be noted that the statute does not require any particular kind of notice. It means, of course, actual notice, either written or oral, but any such notice given to any person competent to receive it would be sufficient under the statute. In order to make out this case, it would be necessary for the State to prove notice to a person authorized to receive it on behalf of the defendant company, and such a notice as would be regarded a compliance with the provisions of the statute under which the indictment was framed.

It is argued by counsel for the plaintiff in error that the power company had the right, under the laws of this State, to build and maintain a pond and dam in connection with the operation of its business, and it is insisted that, having the right to do this, the State can not indict and punish it for an act which it was authorized to perform. But manifestly no such question as this can arise upon demurrer to this indictment. If the point is well taken, it can be made in defense to the indictment when the defendant is put on trial. The defendant is sufficiently informed of the nature and character of the offense alleged against it, and, in our opinion, the allegations of the presentment are sufficient as against the demurrer filed by the defendant.

Judgment affirmed.

3867. KIRK v. THE STATE.

HILL, C. J. The discretion of the court in refusing to grant a new trial on an extraordinary motion therefor, based on alleged newly discovered testimony, was properly exercised, where it appeared that the testimony alleged to be newly discovered was substantially the same as in the original motion for a new trial, made on the same ground, and was only cumulative and impeaching in character, and would probably not produce a different verdict on a second trial.

Judgment affirmed

DECIDED JANUARY 30, 1912.

Accusation of sale of liquor; from city court of Carrollton—
Judge Beall. November 4, 1911.

Buford Boykin, for plaintiff in error.

C. E. Roop, solicitor, contra.

3868. *BOYD v. THE STATE.*

RUSSELL, J. The dwelling-house of a landlord is not the place of business of a cropper, in the contemplation of the act of 1910, (Ga. Laws, 1910, p. 134), which prohibits one from carrying around a pistol without a license "outside of his own home or place of business." Especially is this true where it affirmatively appears that the cropper did not live in the house with his landlord, but lived in a different dwelling. The verdict of guilty was fully authorized. *Judgment affirmed.*

DECIDED JANUARY 30, 1912.

Accusation of carrying pistol without license; from city court of LaGrange—Judge Harwell. November 2, 1911.

M. U. Mooty, for plaintiff in error.

Henry Reeves, solicitor, contra.

3876. *SEWELL v. THE STATE.*

POTTE, J. The evidence was sufficient to authorize the verdict. The alleged newly discovered evidence was merely cumulative and impeaching in its character, and the court did not abuse its discretion in overruling the motion for a new trial. *Judgment affirmed.*

DECIDED JANUARY 30, 1912.

Indictment for bigamy; from Coweta superior court—Judge R. W. Freeman. November 13, 1911.

J. C. Newman, for plaintiff in error.

J. R. Terrell, solicitor-general, contra.

3877. *CHENEY v. THE STATE.*

The act of 1910 (Acts 1910, p. 134) makes it a misdemeanor for a person "to carry around with him on his person, or to have in his manual possession outside of his own home or place of business," "any pistol or revolver, without first taking out a license from the ordinary" of the county of the party's residence. Where the accused had a pistol in his manual possession, on the public road, without the license thus required, the case was within the express terms of the act; and it would constitute no defense that his possession was only temporary, and solely for the purpose of transporting the pistol and delivering it to the owner, who had previously left it at the home of the accused.

DECIDED JANUARY 30, 1912.

Certiorari; from Putnam superior court—Judge J. B. Park. November 11, 1911.

Roy D. Stubbs, for plaintiff in error.

Joseph E. Pottle, solicitor-general, *S. T. Wingfield*, contra.

HILL, C. J. Sid Cheney was convicted of a violation of the act approved August 12, 1910 (Acts 1910, p. 134), entitled: "An act to prohibit any person from having or carrying about his person, in any county in the State of Georgia, any pistol or revolver without first having obtained a license from the ordinary of the county of said State, in which the party resides," etc. On his trial the evidence clearly showed—indeed, it was not denied—that he had a pistol in his manual possession on the public road of the county in which he was indicted, and that he had not the license required by the statute. The defense relied upon, based alone upon the defendant's statement to the jury, was that the pistol had been left at his house by a neighbor, to whom it belonged, and that he was carrying it to the house of the owner for the purpose of delivering it to him, and was not carrying it about his person within the purview of the statute, and therefore was not violating its terms; and he requested the court to instruct the jury to the effect that if they believed, under the evidence, that he had the pistol in his manual possession on the occasion referred to, for the sole purpose of returning it to its owner, it would be their duty to acquit him. The refusal to give this instruction is assigned as error.

The judge instructed the jury that if they believed, under the evidence, beyond a reasonable doubt, that the accused had this pistol in his manual possession outside of his home, or place of business, no matter for what purpose, without first having obtained the license required by law, they would be authorized to find a verdict of guilty. This statement of the law was too strong, but, under the facts of this case, it was harmless. The object of the law is to prohibit any person without the license required from having about his person or carrying around in his possession a pistol or revolver. The proviso that he may have in his manual possession a pistol at his own home or place of business is the only exception made by the terms of the act. While statutes must be given a reasonable construction for the purpose of carrying out the legislative intent, they should never be so liberally interpreted as to render ineffective this intent. It certainly would afford the very broadest latitude for

the evasion of the terms and purposes of the act in question, if it should be held that a person without the license required by the statute could be allowed to take a pistol and carry it on his person and in his manual possession from his own home, for the purpose of delivering it to the alleged owner of the pistol, who resided elsewhere, and especially where the alleged owner lived at some distance from him.

The law does not state how long a person shall have in his manual possession and carry about his person a pistol or revolver, to constitute a violation of the statute. It simply provides that "it shall be unlawful for any person to have or carry about his person, in any county of the State of Georgia, any pistol or revolver, without first taking out a license from the ordinary" of the county in which he resides; and the only exception to the act is that he may have the pistol in his manual possession while in his own home or own place of business, without taking out the license. If he carries the pistol around on his person, or has it in his manual possession elsewhere without the license, he violates the express terms of the law. It may be true that the purpose of the statute was to lessen the pernicious habit of carrying on the person a pistol, and to supplement the law forbidding the having and carrying about the person of pistols or revolvers concealed; but if the evil habit could not be shown without proof of more than one act of having on the person a pistol, the object of the law would be defeated; and this court will not construe the statute with such latitude as would not only make evasion easy, but would render the act practically ineffective.

Besides, the express language of the statute forbids the manual possession of a pistol outside of the party's home or place of business without the license; and while it may be, as suggested by Mr. Justice Lumpkin in *Strickland v. State*, 137 Ga. 1 (72 S. E. 260), a too narrow and strict construction to hold that the act would be violated by picking up a pistol that had fallen from the window of his house on the public street, for the purpose of carrying it back into his house, or in similar cases of emergency, yet it certainly can not be reasonably contended that the act is not clearly violated under the facts of this case.

Judgment affirmed.

3878. RICE v. CITY OF MOULTRIE.

The petition for certiorari alleging that bond and security were given as required by law, and having been duly sanctioned, and it not affirmatively appearing from the answer of the mayor, or otherwise from the record, that this allegation was untrue, the court erred in dismissing the certiorari upon the ground that bond and security had not been given by the applicant as required by law.

DECIDED JANUARY 30, 1912.

Certiorari; from Colquitt superior court—Judge Thomas. November 4, 1911.

L. D. Moore, for plaintiff in error.

A. B. Burton, J. D. McKenzie, contra.

RUSSELL, J. So far as appears from the record, the certiorari bond required by law had been filed with the clerk of the municipal court as provided by law. The clerk of the municipal court had so certified, and this certificate was attached to the petition. The answer of the mayor, while not affirming, did not deny the allegation of the petition for certiorari, or the certificate of the clerk of the mayor's court; consequently it was error to dismiss the certiorari upon the ground that the clerk of the mayor's court had not approved the bond filed in the case. The petition for certiorari alleged, and the certificate of the clerk of the mayor's court confirmed the statement, that the very bond required by law had been given; and nothing appears in the record to dispute this statement.

The ruling would be different if it appeared from the record that the judge of the superior court, as he can do (*Stallworth v. Macon*, 125 Ga. 250, 54 S. E. 142), had made an investigation into the facts in relation to the bond, and upon such investigation had discovered (either because of failure to recite the proper conditions, as in *Roach v. Atlanta*, 7 Ga. App. 172, 66 S. E. 484, or because it was approved by the mayor instead of the clerk, or for some other reason) that the bond had not been given as required. In the present case we learn this fact from the brief of the counsel for the defendant in error, but the fact does not appear from the record, nor is it certified in the bill of exceptions that such is the fact, so that this court may know that such is the truth of the case, and that for that reason the judge of the superior court dismissed the certiorari.

Judgment reversed.

3885. MARTIN *v.* THE STATE.

1. In a criminal case the trial is not completed until a verdict has been rendered.
2. Where the judge presiding in a criminal trial leaves the county of the trial while the jury is deliberating upon its verdict, and goes to an adjoining county, the pending trial is vitiated, and a verdict thereafter returned by the jury is a nullity.
3. The assignments of error other than those ruled upon above are without merit.

DECIDED JANUARY 30, 1912.

Indictment for sale of liquor; from Decatur superior court—
Judge Frank Park. November 16, 1911.

G. G. Bower, for plaintiff in error.

W. E. Wooten, solicitor-general, *F. A. Hooper*, contra.

RUSSELL, J. It appears, from the evidence, that in the trial of the plaintiff in error "the jury retired about 7 o'clock in the evening, to consider their verdict, and that the presiding judge thereupon left the jurisdiction of Decatur county, and went to Grady county to grant a charter in a county other than that which the defendant was being tried in." In the motion for new trial the facts are stated as above, and the complaint is made that the verdict is contrary to law by reason thereof. The question presented by the record, therefore, is whether the fact that the judge left the county where the trial was being conducted and the jury were deliberating upon their verdict, and went to a different county, to perform another official duty, so vitiates the trial as to avoid the finding of the jury.

It must be admitted that any absence of the presiding judge while the trial is going on is an irregularity, and if the question were an open one we should hold that any absence of the judge, no matter how brief, necessarily suspends a pending judicial proceeding. But, under rulings of the Supreme Court, there are occasions when a temporary absence of the judge, even though the trial is in active progress and the jury has not retired, can not be said to be harmful to either party. *O'Shields v. State*, 81 Ga. 301 (6 S. E. 426); *Pritchett v. State*, 92 Ga. 65 (18 S. E. 536). The Supreme Court in *Horne v. Rogers*, 110 Ga. 362, 370 (35 S. E. 715, 49 L. R. A. 176), held that a mere temporary absence of the judge, where he was within the call of the jury, was not such an irregularity as would necessitate a new trial. It has also held that a tem-

porary absence out of sight, within hearing of what was going on in the court-room, did not affect the trial, when this temporary withdrawal of the judge occurred during the argument of counsel. It is to be noted, however, that in deciding the *Horne* case, *supra*, the rulings in the *O'Shields* and *Pritchett* cases, *supra*, were criticised and disapproved, and these earlier rulings were followed only in the absence of an application to review them. In the present instance, however, the judge went beyond the jurisdiction of the court in which the trial was pending. The jurors could not be said to have been even constructively in his presence, and the presence of the judge was indispensable to the legality of the court. If there is no judge, there is no court.

It is not apparent that the defendant in the present case was hurt by the absence of the judge. The testimony adduced on the trial fully authorized the conviction of the defendant, and there is no evidence that the verdict was affected by any improper influence or contact on the part of bystanders or others, or that they knew that the judge was absent from the county, or that their finding was in any way affected by that fact. It is naturally suggested that the trial had progressed so far that the presence of the judge was no longer necessary, until the jury might return into court, and that, as it was not necessary that the judge should remain at the court-house until notified that the jury desired to return a verdict, it could not matter if, in the judge's desire to perform other duties of importance in an adjoining county, he should go there, instead of remaining at his hotel or some other house, within reach of the jury. It was, no doubt, upon the latter theory that the learned trial judge acted, and the recital of the assignment of error evidences his diligence in the discharge of his judicial duties.

However, as a criminal trial is not completed until the verdict has been rendered, the question which really arises is whether it is not necessary, in order to preserve unimpaired the right of trial by jury, that injury be presumed from the violation of any of those orderly rules which safeguard the right. It seems to us that injury is to be presumed, in so important a matter as trial by jury, even in the absence of proof to that effect, where injury is likely to result from an infraction of a general rule, and especially such an

important one as that which looks to the present personal supervision and control of the presiding judge as a sine qua non of a legal trial. There can be no trial without a judge. The case must be tried in Decatur county. Naturally we conclude that when the judge left Decatur county and went to Grady county to open a special court, to grant a charter in that county, the court ceased, for the time being at least, to exist in Decatur county, and that all that was done during the absence of the judge was nugatory and void. A temporary absence of the judge, such as has been referred to in the cases cited above, involved his presence at a point where he was easily accessible to the parties, counsel, officers of court, and the jury. Where the judge is within call of the jury and physically absent, but at a place so near by that he can easily return if needed, he may be presumed to be constructively present at the court-house, but this presumption can not be indulged when the judge goes to a place beyond the jurisdiction of the court in which the trial is being had. Where the judge is not only physically out of the presence of the jury, but also absent in a legal sense, and at such a point as to be beyond the reach of the other essential component but subordinate parts of the court, which should be subjected to his supervision, the court is necessarily dissolved pro tempore, at least so far as the trial first pending is concerned.

Judgment reversed.

3886. BROWN v. THE STATE.

POTTLE, J. The evidence authorized the verdict. *Judgment affirmed.*

DECIDED JANUARY 30, 1912.

Accusation of abandonment of child; from city court of St. Marys—Judge Atkinson. October 17, 1911.

Emmett McElreath, John J. Moore, E. W. Brinkins, for plaintiff in error.

S. C. Townsend, solicitor, contra.

3887. YOPP v. THE STATE.

HILL, C. J. The facts of this case bring it squarely within the principle of law announced by this court in *Bray v. Commerce*, 5 Ga. App. 605 (63 S. E. 596), and cases cited; and the judgment refusing to grant another trial must be reversed. *Judgment reversed.*

DECIDED JANUARY 30, 1912.

Accusation of sale of liquor; from city court of Dublin—Judge Hawkins. November 7, 1911.

J. S. Adams, for plaintiff in error.

George B. Davis, solicitor, contra.

3892. BROADWATER v. THE STATE.

1. It is not necessary in an indictment for perjury to set out, either literally or in substance, the form of the oath alleged to have been administered to the defendant as a witness in the judicial investigation in which the perjury is alleged to have been committed. The jury can plainly understand this ingredient of the offense if it is alleged in the indictment that the oath administered to the defendant was a lawful oath, and if the time, place, and nature of the investigation, and the authority of the tribunal in which the perjury is alleged to have been committed, are so distinctly stated as to exclude every other inference than that the oath administered was in substance that prescribed by law, and that it was consciously taken by the accused when he testified as a witness. Generally, the form of oath administered to a witness is immaterial; and that it was a lawful oath may sufficiently appear without setting out the oath in full.
2. An act of the General Assembly conferring power upon municipal authorities to try all violators of ordinances of the municipality, and to sentence those adjudged to be guilty, and to fine them, imprison them, or compel them to work in a chain-gang upon the public streets, creates, by charter, a court. "Every court has power . . . to administer oaths in an action or proceeding pending therein, and in all other cases, when it may be necessary, in the exercise of its powers and duties." Civil Code (1910), § 4644 (5).
3. In a trial before a municipal court composed of a board of commissioners any member of the board may administer an oath to a witness.
4. Proof that an ordinance was passed by the town council of a municipal corporation will support an allegation that it was passed by the general council of the corporation. In view of the fact that the charter of Kingston provides for only one municipal body, the variance between the term "town council," as used in the charter, and the term "general council," as used in the presentment, in reference to this municipal body, is not material.

5. It is essential that the materiality of the testimony alleged to have been false should be made to appear in the indictment; and a day certain upon which the alleged perjury was committed must be stated. In the case at bar the allegations of the indictment sufficiently conform to these requirements.
6. There was no error in overruling the demurrer.

DECIDED JANUARY 30, 1912.

Indictment for perjury; from Bartow superior court—Judge Fite. November 17, 1911.

M. B. Eubanks, for plaintiff in error.

T. C. Milner, solicitor-general, by *George W. Stevens*, contra.

RUSSELL, J. Exception is taken to a judgment overruling a demurrer to a presentment for the offense of perjury. Without insisting too strongly upon the maxim that "Demurrer, being a critic, must itself be free from imperfections" (*Douglas, Augusta & Gulf Ry. Co. v. Swindle*, 2 Ga. App. 550, 556, 59 S. E. 600), which in the present case might be applied to at least one of the grounds of the special demurrer, we have fully considered each of the objections sought to be presented.

1. It is insisted, in the first place, that the alleged lawful oath is not set out in the body of the indictment, and that the facts alleged do not show that the oath was a lawful oath, or that the defendant was sworn as a witness in any case. It is plain, from the allegations of the indictment, that the board of commissioners of the Town of Kingston were sitting, as such, to try one Charles Davenport for a violation of ordinance No. 39, which is quoted in the presentment. This is a sufficient statement of the case. It is as ample as if the case had been described as the case of the board of commissioners of the Town of Kingston against Charles Davenport, or the town council of Kingston against Charles Davenport, charged with a violation of ordinance No. 39. It is not seriously insisted that it is necessary to set out in totidem verbis the oath actually administered upon the trial. Of course, it is necessary that it should be properly alleged that the oath administered to the witness Broadwater on the trial of Davenport was a lawful oath, and it may be that this statement, without more, in the indictment could be treated as a mere conclusion of the pleader, though we are inclined to doubt this. But certain it is that the allegations in reference to the administration of the oath and the proceeding in which it was administered set forth sufficient facts to enable the

jury and the defendant to understand that the accused, in the investigation referred to, obligated himself to speak truly in regard to the material matter in relation to which he is alleged to have testified knowingly, wilfully, and absolutely falsely. It is not necessary, in an indictment for perjury, to set out, either literally or in substance, the form of the oath alleged to have been administered to the defendant as a witness in the judicial investigation in which the perjury is alleged to have been committed. The jury can plainly understand this ingredient of the offense if it is alleged in the indictment that the oath administered to the defendant was a lawful oath, and if the time, place, and nature of the investigation, and the authority of the tribunal in which the perjury is alleged to have been committed are so distinctly stated as to exclude every other inference than that the oath in fact administered was in substance that prescribed by law, and that it was consciously taken by the accused when he testified as a witness. Generally, the form of oath administered to a witness is immaterial; and that it was a lawful oath may sufficiently appear without setting out the oath in full.

There are some specific exceptions, such as the form of oath prescribed before the grand jury, which vary slightly from the usual form of oath prescribed for a witness upon the trial of the case. But where perjury is assigned upon testimony falsely delivered before a grand jury, it will be assumed that the lawful oath charged by the indictment to have been administered was that prescribed to be administered to witnesses before the grand jury; and if, upon the trial, it appears that the required oath was not administered, the defendant will be entitled to the advantage to be derived from a variance between the allegations and the proof. We hardly think, however, that the indictment would be demurrable, if it be alleged that the witness was sworn before the grand jury, and that the oath administered to him was a lawful oath. And so, in this case, it being stated in the indictment that the accused appeared as a witness on a certain day, in a case in the municipal court of Kingston, in the trial of one accused of a violation of a city ordinance, and that a lawful oath was administered to him as such witness, it is easily to be understood that the charge of the indictment upon this part of the case is that a form of oath legally suitable to the nature of the investigation then pending was administered to him;

in other words, that he swore to tell the truth in the case actually on trial, and which he understood to be on trial. As to all matters material to the issue with reference to which he testified, the solemn assumption of an obligation to speak the truth, consciously assumed by the witness in the pending investigation, is more important than the form of the words in which the oath is administered to him. It would seem to us that if the witness had sworn that his testimony in this case would be the truth, the whole truth, and nothing but the truth, the oath administered to him would have been a lawful oath. Clark's Cr. L. 385; Whart. Cr. L. 1287; Bish. Cr. Pr. §§ 902, 912, par. 2.

2. The third ground of the demurrer challenges the authority of Griffin (who is alleged to have administered it) to administer, as one of the board of commissioners of the Town of Kingston and as president of the board, the oath alleged; and in the eighth ground it is insisted that the board of commissioners of the Town of Kingston were not a court, and had no jurisdiction as a court, nor any authority to summon, swear, or hear witnesses. In the original charter granted to the Town of Kingston (Acts 1869, p. 81) the board of commissioners were given power to pass such rules and ordinances for the good government and order of said town, the collection of town taxes, the punishment of disorderly conduct, the preservation of peace and quiet, and the protection of the citizens of, and persons visiting, said town as they might think necessary and proper, and to assess fines, in their discretion, not exceeding \$100, for the violation of any of their rules or ordinances; but there was no express grant of power to try the offenders. By the act of 1895, section 2 (Acts 1895, p. 242), the charter was amended, and it was provided that "any person or persons violating any of the laws or ordinances of said town shall be tried therefor by said board of commissioners, and on conviction thereof" shall be punished as prescribed in this section. An act of the General Assembly conferring power upon the municipal authorities to try all violators of the ordinances of the town, and to sentence those adjudged to be guilty, and to fine them, imprison them, or compel them to work in a chain-gang upon the public streets, creates, by charter, a court. *Swafford v. Berrong*, 84 Ga. 65 (10 S. E. 593). "Every court has power . . . to administer oaths in an action or proceeding pending therein, and in all other cases, when it may be necessary, in

the exercise of its powers and duties." Civil Code (1910), § 4644 (5).

3-5. The rulings stated in the third, fourth, and fifth headnotes require no elaboration. It is only necessary to say, in explanation of the fifth headnote, that the ordinance, for a violation of which Charles Davenport was being tried in the municipal court, was one forbidding any person to be drunk or disorderly on the streets of the Town of Kingston, and it is alleged that the accused, as a witness, swore on the trial of Davenport that the latter "was not drunk on the day and date aforesaid, and that he had been with Charles Davenport from one o'clock to about 4.30 o'clock p. m., and that Charles Davenport had not drunk a drop." Clearly this testimony was material to the issue before the court. As to the matter of date, nothing can be said except that the indictment alleges distinctly that the day on which the perjury was committed, and the day with relation to which the witness testified, were the same day. As such a state of facts is not impossible, the demurrer fails to present any point for consideration. If upon the trial it should appear that the day with reference to which the defendant testified was a different day from the one on which Davenport was accused of being drunk, even then, perhaps, no question would be presented, for the State is not compelled to prove that the perjury was committed on the exact date alleged in the presentment.

6. There was no error in overruling the demurrer.

Judgment affirmed.

3896. ROBINSON v. THE STATE.

HILL, C. J. 1. "The credibility of witnesses whose testimony goes to the jury through the medium of dying declarations is subject to the same attack, and should be determined under the same rules governing the testimony of living witnesses who testify upon the stand." Where, therefore, the State introduces in evidence a dying declaration, and the accused attacks the credibility of the declarant, by proof of general bad character, or in any other way in which the law authorizes the impeachment of witnesses, it is the duty of the court, in response to an appropriate and timely written request, to instruct the jury that the dying declaration, as evidence, should be considered under the same rules that govern in determining the credibility of witnesses who testify from the stand. *Hall v. State*, 124 Ga. 651 (52 S. E. 891); *Nesbit v. State*, 43 Ga. 238.

2. The exception to the charge of the court on the subject of dying declarations is fully controlled by the decision of a majority of this court in the case of *Darby v. State*, 9 Ga. App. 700 (72 S. E. 182).
3. According to the evidence, the decedent had previously made an assault with a deadly weapon upon the accused. It was a question for the jury to determine whether, between this assault and the homicide, sufficient "cooling time" had elapsed. So the law of voluntary manslaughter was involved.

Judgment reversed.

DECIDED JANUARY 30, 1912.

Conviction of manslaughter; from Washington superior court—
Judge Rawlings. November 13, 1911.

John R. Cooper, for plaintiff in error.

Alfred Herrington, solicitor-general, contra.

3897. BUTLER v. THE STATE.

No error of law was committed, and the evidence warranted the verdict.

DECIDED JANUARY 30, 1912.

Conviction of shooting at another; from Grady superior court—
Judge Frank Park. November 13, 1911.

W. M. Harrell, R. R. Terrell, M. L. Ledford, for plaintiff in error.

W. E. Wooten, solicitor-general, Frank A. Hooper, contra.

POTTLE, J. The accused was indicted for assault with intent to murder one Knight, and was convicted of the statutory offense of shooting at another. The charge was full and fair—in fact rather more favorable to the accused than he had any right to demand, and did not contain any expression or intimation of opinion as to what had been proved. In the motion for a new trial complaint is made of several instructions upon the theory of the right of the accused to resist an unlawful arrest. The testimony of the prosecutor made a clear case of assault with intent to murder. The statement of the accused set up self-defense. It is doubtful if, under the evidence, the accused was entitled to an instruction upon the theory of his right to resist an illegal arrest, and it is certain that there was no error in the charge of which he can justly complain, nor in the failure of the judge to elaborate more fully this theory of defense. It was not error to repel testimony that no case had been made against the accused in the mayor's court for disorderly con-

duct, growing out of his behavior immediately prior to the shooting. Such evidence would have been irrelevant to any issue in the case. The mere fact that officers charged with that duty fail to prosecute for the offense does not prove that the offense was not committed. Especially is this true where, in a case like the present, the offense for which there was a failure to prosecute was disorderly conduct which culminated in an attempt to take human life, and the person guilty of the disorderly conduct was awaiting trial for the more serious offense. As well might it be said that failure to indict a murderer for carrying a pistol without a license would be evidence that he was not guilty of the latter offense.

The accused was fortunate in escaping punishment for the more serious crime of assault with intent to murder. In their humanity the jury gave him the benefit of the doubt and convicted him of the lower grade of crime. There were some facts and circumstances to warrant such a finding, and this court will not interfere.

Judgment affirmed.

3899. RICKERSON *v.* THE STATE.

1. The evidence, taken in connection with the prisoner's statement, fully authorized a conviction of voluntary manslaughter.
2. When the State proves that the accused killed the person named in the indictment, in the county and in the manner therein described, a *prima facie* case of murder is made out. The evidence in the present case warranted an instruction to this effect.
3. The evidence authorized a finding that the homicide was committed in Jasper county.
4. The charge was full and fair. Any inaccuracies in reference to the law of murder were harmless. The requests to charge, so far as legal and pertinent, were covered by the general charge, which was free from prejudicial error. The evidence warranted the verdict.

DECIDED JANUARY 30, 1912.

Conviction of manslaughter; from Jasper superior court—Judge J. B. Park. November 23, 1911.

W. S. Florence, for plaintiff in error.

J. E. Pottle, solicitor-general, contra.

POTTLE, J. Rickerson was indicted for the murder of Moseley and convicted of voluntary manslaughter. His motion for a new trial was overruled, and he sued out a writ of error to this court.

He contends that neither under the evidence nor under the statement of the accused can a verdict of manslaughter be justified—that he is guilty of murder, or not guilty of any offense.

1. It would serve no good purpose to enter into a long discussion of the evidence. Suffice it to say that the jury could have found that both men were drunk and ready to fight; that Moseley indicated a willingness to fight and threatened to kill the accused unless he took another drink; that Rickerson left Moseley, went to a near-by buggy, got a pistol, returned to Moseley, who was sitting in his buggy, and then both began shooting at about the same time. This theory brings the case squarely within the ruling made in *Gann v. State*, 30 Ga. 67, and cases of kindred nature. The judge fairly presented this theory of the case, and there was no prejudicial error in his instructions on the subject.

2. The court charged, in effect, that when the State shows the killing, the burden is shifted to the accused, to mitigate or justify it. This is unquestionably the law, and the charge was warranted by the evidence. The State relied partly upon proof of incriminating admissions by the accused. While some of the witnesses testified that exculpatory statements were coupled with the admissions, one witness testified to a bald confession without any attempt at justification. It makes no difference how a killing be shown; when once proved, a prima facie case of murder is made for the State, unless, of course, it is made to appear at the same time that the killing is justifiable, or a lower grade of homicide has been committed. Whenever such a prima facie case is made, the burden is on the accused to set up his defense. This is what the trial judge charged, and his language was so guarded as not to prejudice the accused.

3. Complaint is made in the motion for a new trial that the venue of the offense was not proved. Kelly and Farrar are two railroad stations about two miles apart in the northern part of Jasper county, Kelly being south of Farrar. There is also a public road between these two villages. The accused lived on this public road, and a witness named Spearman also lived on it, about four hundred yards from the accused. Spearman testified: "My house and the house where Rickerson lived is on the same road, but on different sides of the road. It is level from Rickerson's house for about fifty or one hundred yards, then you go down grade, a hill, and then up a pretty good hill and down a long hill to my

house." Newborn is a town about on the line between Newton and Jasper counties. Cranford, who was jointly indicted with Rickerson, lived northeast of Farrar. On the day of the homicide the deceased went in his buggy to the home of the accused and persuaded the accused to go with him to arrest a negro. Before going to make the arrest they drove northward to Newborn, where the accused had some business to transact. Remaining there awhile, they got in the buggy and started back southward to go to the negro's house. They remained at this house about three hours, and effected a settlement with the negro. After leaving the negro's house they made several stops along the way, and finally, in the language of the accused, "We trotted on and got next to Guy Spearman's. We struck another trot to the other slant, and just as we got on top of the rise there near the cotton-patch, he said, 'Let's take another drink.'" It was at this point the shooting took place. Cranford came up just before the shooting and left shortly afterwards. Guy Spearman testified that in going from Rickerson's house to where Cranford lives, you would travel north and northwest and go through Farrar. "This is the way you would travel if you went *from the scene of the homicide* to Cranford's." He further testified, that he and his wife were at their home on the night of the homicide and heard four or five pistol-shots; that after a little while he saw a buggy come over the hill, and, in about a minute or two, a man came running over the hill and got into the buggy, nearly in front of his house, and drove on towards Farrar. The circumstances indicate that this man was Cranford. The witness said that he heard "hollering" in the direction of Kelly, seemingly in the same direction as the firing of the pistol. The man who got in the buggy came from towards Kelly and Rickerson's home. "This I have just told the jury was in this county and State." Also: "I will state that the point that I heard the pistol-shots fire was in Jasper county, Georgia." Mrs. Spearman testified that "it was in the direction towards Kelly that I heard hollering, and the pistol-shots were in the same direction." Another witness for the State testified that he heard the pistol-shots, and shortly afterwards saw Cranford coming from towards Kelly, "from the direction in which I heard the pistol-shots." We are clear that, taking all this evidence together, in connection with the statement of the accused, the jury were authorized to find that the homicide occurred in Jasper county.

4. There are numerous assignments of error upon the court's charge. Many of them complain of instructions in reference to the law of murder. None of the assignments are meritorious. The instructions seem to be free from error, but even if they contain inaccurate statements, the accused was convicted of voluntary manslaughter, and was not prejudiced in any way by the charges upon the law of murder. The requests, in so far as they were legal and pertinent, were fully covered by the general charge, which was free from substantial error. The accused had a fair and impartial trial, and we find nothing in the record which would authorize interference by this court.

Judgment affirmed. Russell, J., dissents.

3901. CLARK *v.* TRIPPE.

Where a municipal ordinance authorized the mayor to impose sentence in the alternative of a fine or work on the public streets of the city, and the mayor sentenced a person in the following language: "Fine \$50, or 60 days at hard labor on," the sentence was not void for uncertainty because it was not dated and the place where the alternative part of the sentence was to be executed was not stated. Under the ordinance, the only place where that part of the sentence imposing hard labor could have been executed was "upon the public streets" of the municipality. It was not erroneous for the judge hearing an application for discharge on habeas corpus, on account of the alleged uncertainty of the sentence, to permit the mayor who heard the case and imposed the sentence to insert therein the date, and to add thereto the words "the public streets of Blakely," although the amendment was not necessary.

DECIDED JANUARY 30, 1912.

Habeas corpus; from city court of Blakely—Judge Rambo. November 23, 1911.

The plaintiff in error was convicted in the municipal court of the City of Blakely of the violation of an ordinance by keeping intoxicating liquors in his possession for unlawful sale, and the following sentence was imposed. "Fine \$50, or 60 days at hard labor on." He sought, by habeas corpus, to obtain release from custody under this sentence, which he alleged was void because not dated, and because it did not indicate where the labor was to be performed. At the hearing of the application for habeas corpus the mayor who passed the sentence testified that the labor referred to was to be performed on the public streets of Blakely, and that the clerk who wrote

out the sentence failed to add the words, "the public streets of Blakely;" that the sentence as actually passed was a fine of \$50, or hard labor on the public streets of Blakely for 60 days. He testified that he was still mayor of Blakely. Thereupon the judge directed the witness to insert the date of the sentence, August 12, 1911 (it being agreed by both parties to the record that the trial in the municipal court took place on that date), and to add to the sentence, "public streets of Blakely," and to sign his name thereto as mayor and ex-officio recorder; and the docket entry as thus amended was introduced in evidence. It appeared that there had been no effort to have the judgment of the municipal court reviewed by certiorari, that no objection to its legality had been made otherwise than in the habeas corpus proceeding, and that no part of the sentence had been satisfied.

Exception is taken to the allowance of the amendment of the sentence, and to the refusal of the application for habeas corpus.

Byron R. Collins, for plaintiff in error.

HILL, C. J. (After stating the facts.)

There was no error. It was admitted that the movant was tried for a violation of the city ordinance, and that he was found guilty by the mayor's court, and that he was in the custody of the respondent, in pursuance of the sentence then passed upon him; and this custody was legal. It was immaterial that the sentence did not contain the words "on the public streets of Blakely." The ordinance authorized the mayor to punish those convicted under it by fine, or by requiring them to work on the public streets of the city. There was no other place where the sentence to perform labor could be carried out. It necessarily followed that the sentence following the conviction, of a fine of \$50, or the alternative of "60 days hard labor on," could only mean a fine of \$50, or the alternative sentence of 60 days hard labor on the public streets of the City of Blakely. We do not think that the sentence was in any sense doubtful. But even if it was doubtful, it was clearly made certain by the testimony of the mayor who had tried the movant and imposed the sentence; and in pursuance of the maxim *id certum est quod certum reddi potest*, it was competent to have the words, "on the public streets of the City of Blakely," added to the sentence, as well as to insert the date of the sentence. The date, however, was immaterial, for that part of the sentence which required, as an al-

ternative, labor upon the streets of the city would be computed, not from the date of the sentence, but from the date of the delivery of the accused to the authorities of the city in charge of working the streets with city convicts.

Judgment affirmed. Pottle, J., disqualified.

3902. SOLOMON v. THE STATE.

- RUSSELL, J. 1. There was no error in overruling the motion for a continuance, especially in view of the fact that it did not appear that the movant had subpoenaed the absent witness before he left the jurisdiction of the court, or had exercised any diligence in attempting to procure his presence.
2. Under the facts of this case, failure of the court to instruct the jury upon the subject of alibi was not reversible error, in the absence of a timely and appropriate written request. *Smith v. State*, 6 Ga. App. 577 (65 S. E. 300).
3. It is within the power and right of a jury to believe a witness, no matter what effort may have been made to impeach him, or what testimony has been presented for that purpose, and even though the witness be not corroborated. The credibility of witnesses is exclusively for the jury, and it is not error to instruct the jury that they may accept the explanation of a witness as to why he has made contradictory statements, even though it be not sustained by other facts or circumstances.
4. There was no error in allowing a witness to state, in explanation of his reason for leaving his former residence, that he did so because certain persons put him in fear of his personal safety. It not appearing that the defendant was one of the parties who were alleged to have intimidated the witness, the testimony could not have been prejudicial to the defendant, but would seem to have been rather to his advantage.
5. The evidence authorized the verdict, and the trial appears to have been free from error.

Judgment affirmed.

DECIDED JANUARY 30, 1912.

Indictment for arson; from Coffee superior court—Judge Parker. November 24, 1911.

O'Steen & Wallace, for plaintiff in error.

M. D. Dickerson, solicitor-general, contra.

3904. BASLEY v. THE STATE.

Where a master entrusts to his servant a bill for the purpose of getting it changed and bringing back the change to him, and the servant fraudulently appropriates the bill to his own use and does not return it or the change, he is guilty, not of simple larceny, but of larceny after trust.

DECIDED JANUARY 30, 1912.

Accusation of larceny: from city court of Vienna—Judge Lassiter. November 27, 1911.

Alexander Akerman, John R. Cooper, for plaintiff in error
Watts Powell, solicitor, contra.

POTTLE, J. Basley was a servant upon the farm of Nobles in Dooly county. Nobles agreed to advance him \$21, and Basley agreed to go to Macon and use this money in transporting his wife and household goods to Dooly county. On Wednesday Nobles gave him five five-dollar bills in Dooly county, and Basley agreed that he would get the money changed in Macon, where he was going, and repay the four dollars the next Friday, on his return. He converted the whole amount to his own use. He was convicted of simple larceny, under an accusation charging that offense.

The case seems to fall squarely within that of *Mobley v. State*, 114 Ga. 544 (40 S. E. 728), where it was held: "When a master entrusts to his servant a bill for the purpose of getting the same changed and bringing back the change to the former, and the latter fraudulently appropriates the bill to his own use and does not return either it or the change, he is guilty, not of simple larceny, but of larceny after trust." The distinction between the case in hand and cases like *Finkelstein v. State*, 105 Ga. 617 (31 S. E. 589), and *Walker v. State*, 9 Ga. App. 863 (72 S. E. 446), was pointed out in the *Mobley* case. In those cases no fiduciary relation existed between the owner of the money and the thief, and there was no bailment in a legal sense. In contemplation of law, the legal possession never passed out of the owner. Here there was a technical trust to a person standing in a fiduciary relation, and both the actual and legal possession had been voluntarily surrendered, without any fraud or artifice on the part of the person entrusted, other than that involved in the promise to repay the money at a stated time. *Cunnegin's* case in the 118 Ga. 125 (44 S. E. 846), *Martin v. State*, 123 Ga. 478 (51 S. E. 334), and *Bryant v. State*,

8 Ga. App. 389 (69 S. E. 121), may also be distinguished, upon the principle of *Barron v. State*, 126 Ga. 92 (54 S. E. 812), where Mr. Justice Atkinson very clearly points out the difference between simple larceny, where possession is obtained by fraud, and larceny after trust, where possession is voluntarily surrendered and the relation of bailor and bailee created. *Judgment reversed.*

3911. *DANNIE v. CITY OF ATLANTA.*

HILL, C. J. This case is controlled by the decision of this court in the case of *Cotton v. Atlanta*, ante, 397 (73 S. E. 683).

Judgment reversed.

DECIDED JANUARY 30, 1912.

Certiorari; from Fulton superior court—Judge Pendleton. November 28, 1911.

Walter A. Sims, for plaintiff in error.

J. L. Mayson, W. D. Ellis Jr., contra.

3912. *DANNIE v. CITY OF ATLANTA.*

1. This case is fully controlled by the decision of this court in *Cotton v. Atlanta*, ante, 397 (73 S. E. 683).
2. An ordinance which makes it unlawful to occupy or allow to be occupied any portion of a house to be used as a house of ill fame, or disorderly house, in the city of Atlanta, means occupancy which contributes in some manner to the unlawful character of the house, and does not preclude an innocent and lawful occupancy of a room or a portion of a house which may in other parts thereof be used for disorderly and immoral purposes.

DECIDED JANUARY 30, 1912.

Certiorari; from Fulton superior court—Judge Pendleton. November 28, 1911.

Walter A. Sims, for plaintiff in error.

J. L. Mayson, W. D. Ellis Jr., contra.

HILL, C. J. An ordinance of the City of Atlanta, enacted under charter authority, makes it punishable for any person to occupy or allow to be occupied a house or a portion of the house as a house of ill fame. City Code of Atlanta, § 1837. In *Cotton v. Atlanta*, ante, 397 (73 S. E. 683), it is held that this or-

dinance created no offense different from that covered by the Penal Code (1910), § 382, and that it was therefore invalid, under the rule that a municipal corporation can not punish for an offense against the criminal laws of the State. It is insisted on the part of the city that the ordinance creates a different offense from that created by the penal statute of the State, in that it makes it unlawful for any person to occupy any portion of the house used as a house of ill fame in the city of Atlanta. We do not agree with this view. The purpose of the ordinance is to suppress disorderly houses and to maintain the peace, health, order, and good government of the city, and, in making punishable the occupancy of any portion of a house of this character, it contemplated occupancy of such character as to maintain or contribute to the maintenance of a house of the kind prohibited. We do not think that it was intended to make it unlawful for a person to occupy a room in a house of ill fame or disorderly house, unless such person, while occupying a room therein, was in some way contributing to the unlawful character of the house. If the occupant of the room had no notice that the other portion of the house was being conducted as a house of ill fame, or possibly if he did know that fact and in no way contributed to its unlawful character, he would not violate this ordinance; and we think that the words "occupy any portion of a disorderly house" necessarily carry with them the meaning that the occupancy must be for unlawful purposes. In other words, we think that one could innocently occupy a portion of a disorderly house without having anything whatever to do with the maintaining and keeping of such a house, and it is only the element of maintaining and keeping a house of this character that both the ordinance and the statute are intended to punish. We therefore think that the ordinance is fully covered by the State statute, and for that reason is invalid.

Judgment reversed.

3913. CAIN v. THE STATE.

- RUSSELL, J. 1. The verdict was not, for any reason assigned, erroneous.
2. The admissions of the State's counsel were not at variance with the allegations in the indictment, and the verdict of guilty was authorized by the evidence.
 3. When, in the course of a judicial investigation, an attorney at law, by the authority or permission of the court, administers the oath to a witness, he does so in behalf of the court. Consequently it may properly be alleged in an indictment assigning perjury upon the testimony of such a witness, delivered in a court of inquiry, that the oath was administered by the presiding magistrate.
 4. A conviction of the offense of perjury is authorized when the evidence shows that on the prior investigation the accused testified wilfully, knowingly, absolutely, and falsely, in substance, to the effect alleged in the indictment. It is not necessary that the proof as to the alleged false testimony shall correspond literally with the allegations of the indictment.
 5. None of the assignments of error based upon a variance between the allegations of the indictment and the proof are sustained by the record.

Judgment affirmed.

DECIDED JANUARY 30, 1912.

Indictment for perjury; from Morgan superior court—Judge Walker presiding. December 9, 1911.

Percy Middlebrooks, for plaintiff in error.

J. E. Pottle, solicitor-general, contra.

3918. DUKES v. THE STATE.

POTTLE, J. It was for the jury to say whether they would believe the State's witness, who testified directly to a sale of intoxicating liquor by the accused, or credit the witnesses offered to impeach him. The trial judge having approved the verdict, this court will not interfere.

Judgment affirmed.

DECIDED JANUARY 30, 1912.

Accusation of sale of liquor; from city court of Carrollton—Judge Beall. November 22, 1911.

Buford Boykin, for plaintiff in error.

C. E. Roop, solicitor, contra.

3861. O'NEAL v. THE STATE.

HILL, C. J. 1. In an indictment for the offense of cheating and swindling by obtaining money through false and fraudulent statements and representations, the ownership of the money thus obtained and the name of the person cheated and defrauded should be stated; and the proof in support of these essential allegations must be in strict conformity therewith; otherwise the variance will be fatal. 2 Bishop's New Criminal Procedure, § 184.

2. An allegation in an indictment for cheating and swindling, that the person cheated and defrauded was Robert Hutchinson, is not supported by proof that the bank of which Robert Hutchinson was assistant cashier was cheated and defrauded by the presentation of a check to Hutchinson as such assistant cashier, accompanied by certain false and fraudulent representations relating to the check, which induced Hutchinson, as cashier, to cash the check out of the funds of the bank. Under these facts the bank, and not Hutchinson as an individual, was cheated and defrauded. The fact that Hutchinson subsequently discovered that the check cashed by him for the accused out of the money of the bank of which he was cashier was worthless, and that he had been deceived by the false representations made to him in reference thereto, and paid the loss thus incurred by the bank, did not change the character of the transaction. The offense was complete when Hutchinson, as cashier, paid out the money of the bank for the worthless check, induced to do so by the false and fraudulent representations then made to him by the accused; and the subsequent act of Hutchinson in making good the loss to the bank did not have the legal effect of relating back to the time when the act of cheating and swindling was fully accomplished, and of making him the person cheated and defrauded.

Judgment reversed.

DECIDED JANUARY 30, 1912.

Indictment for misdemeanor; from city court of LaGrange—Judge Harwell. November 2, 1911.

The indictment alleged, in substance, that W. R. O'Neal "did defraud and cheat Robert Hutchinson in the sum and out of thirty dollars in money of the value of thirty dollars, by using the following deceitful means and artful practice, to wit: On said day and date said O'Neal presented to said Robert Hutchinson, assistant cashier of the LaGrange National Bank, a corporation, a check on the Third National Bank of Atlanta, for thirty dollars, and payable to order of said W. R. O'Neal, and purporting to be signed by W. J. O'Neal, for the purpose of having the same cashed, and the same was cashed at the said LaGrange National Bank by said Hutchinson, the said Hutchinson relying on the representation made by said W. R. O'Neal that said check was good and would be paid upon presentation; and, said Hutchinson believing that said check

was good and would be paid when presented to said Third National Bank of Atlanta, he, said Hutchinson, said assistant cashier, paid to said W. R. O'Neal said sum of thirty dollars, in money of value of thirty dollars on and for said check which was worthless and said W. R. O'Neal knew was worthless, and payment of said check was refused by said Third National Bank, no funds being in said Third National Bank subject to said check, all of which said W. R. O'Neal knew, and knowing his said representation to be false, which was false and intended to be false, and by reason of said false representation, said Hutchinson was defrauded and cheated as aforesaid in the sum of thirty dollars." It is admitted that the evidence proved all the allegations of the indictment except the allegation as to the person who was defrauded and cheated, and as to the ownership of the \$30. The evidence as to ownership was that Robert Hutchinson, as assistant cashier, paid the check presented to him by the accused, "with the funds of the LaGrange National Bank;" that the \$30 so paid was not his property, but was the property of the bank. The assistant cashier testified that after the check which he had cashed out of the funds of the bank had been returned to the bank, it remained in the cash drawer of the bank as a cash item against him, for about two days, and that then he took the \$30 out of his pocket and "made it good to the bank;" that this was in accordance with the custom of the bank that where any loss accrued to the bank through his work, it was to be sustained by him. There was no printed rule on the subject, but the bank required him to make the loss good, where it occurred by his negligence or fault.

It is alleged that the court erred in refusing a timely written request of the defendant that the jury be instructed as follows: "If you find that the defendant defrauded the LaGrange National Bank by presenting to its officers this check in evidence, and you find that R. E. Hutchinson did not sustain a loss until after he had ascertained and knew the check was worthless (if it was worthless), and R. E. Hutchinson paid the check, knowing it was worthless at the time he paid it, then the defendant would not be guilty in this case."

M. U. Mooty, for plaintiff in error.

Henry Reeves, solicitor, contra.

3883. *WOODS v. THE STATE.*

1. While good faith may be pleaded as a defense by one prosecuted under the Penal Code (1910), § 781, for maliciously and wilfully injuring and destroying private property, a mere assertion of ownership, though made at the time the property is injured or destroyed, and subsequently repeated, does not demand a finding that the accused acted under an honest claim of right; especially in the absence of any evidence to support such claim.
2. One guilty of maliciously injuring and destroying the private property of another, to wit, "a certain plank and board fence," on his farm, "by then and there tearing down said fence and by splitting and destroying the plank and boards of said fence," may be prosecuted and convicted under the Penal Code (1910), § 781.
3. It is not error to instruct the jury, in reference to the prisoner's statement, that they may believe it in whole or in part, in preference to the evidence, nor to add: "It is a question entirely for you to say just what weight and credit, if any, you will give to the statement."
4. In the present case it was not error, prejudicial to the accused, to charge, that "the title to the land in question will not in any way be affected by your verdict in this case. We can not settle disputes as to titles to land in this court."
5. Where it appears that the property described in the indictment was the private property of the person therein named, and that it was wilfully injured or destroyed in manner and form as alleged, a *prima facie* case is made out for the State.
6. No error of law appears, and the evidence warranted the verdict.

DECIDED JANUARY 30, 1912.

Certiorari; from Wayne superior court—Judge Conyers. November 2, 1911.

Wilson, Bennett & Lambdin, for plaintiff in error.

J. H. Thomas, solicitor-general, contra.

POTTLER, J. The accused was convicted in the county court under an indictment based upon the Penal Code (1910), § 781, charging that he had wilfully and maliciously injured and destroyed a plank and board fence, the private property of one Broadhurst, located on his farm, known as the Moody place. The judge of the superior court refused, on certiorari, to disturb the verdict, and this is the error assigned.

1. The evidence for the State showed that the land on which the fence in question was located was the property of the prosecutor, Broadhurst. The fence had been built by him several years before the transaction referred to in the indictment took place, and during all this time was in the possession of the prosecutor and claimed by him. The accused owned the adjoining farm. On or

about the time alleged in the indictment he injured and destroyed a portion of the fence by sawing out of the plank sections about six inches long, and pulling down a portion of the fence. Other portions fell down after having been sawed through, as above described. The accused claimed that he owned the land upon which the fence was located. He told the prosecutor and one or two others that he intended to tear down the fence because it was on his land. His counsel insist that the evidence demanded a finding that he destroyed the fence under an honest claim of right, and that for this reason his conviction was unauthorized. Good faith is peculiarly a question for the jury. The accused introduced no evidence of his title or previous possession of the disputed land, but contented himself merely with proof of his own prior declarations in reference to his claim of ownership. A mere claim of ownership could not excuse him, nor would it be conclusive evidence of good faith. Certainly one can not justify an injury to his neighbor's dwelling, in which the neighbor has resided for many years, upon mere proof that at the time the injury was done, the perpetrator of the act said that the dwelling was his, and not his neighbor's, without offering something in support of his claim of ownership other than his own assertion of title. The jury in the present case had the right to find that the claim of the accused was a mere pretext, and not made in good faith. The judge of the superior court, on certiorari, has approved their verdict, and this court can not say that there was not some evidence to justify this finding.

2. It is further contended that while the acts of the accused may have amounted to an indictable trespass, under the Penal Code (1910), § 216, par. 3, he can not be convicted under § 781. Counsel rely upon the language of Mr. Justice Simmons in *Crockett v. State*, 80 Ga. 105 (4 S. E. 254), to the effect that the law now embodied in section 781 of the Penal Code does not embrace any crime already defined in the Penal Code. In that case the accused was indicted for setting fire to a dwelling-house, and convicted of malicious mischief. The Supreme Court held that his motion in arrest of judgment should have been sustained, because the offense for which he was convicted was not involved in the indictment. In the present case there was neither demurrer nor motion in arrest. The indictment charges the offense generally, in the language of § 781, and then specifically describes the particular act com-

plained of. So there can be no doubt that the grand jury intended to charge a violation of this particular section. The real complaint of the plaintiff in error is against the indictment; and the point should have been raised by motion to quash, or at least by motion in arrest. So far as this point is concerned, a new trial under this indictment would be of no benefit to the accused. But the Penal Code (1910), § 216, par. 3, makes criminal only "the pulling down or removing any fence or inclosure," and the act need not be wilful. *Shrouder v. State*, 121 Ga. 615, 617 (49 S. E. 702). Here the charge is more comprehensive, and involves some elements not covered by the section last mentioned.

3. Complaint is made that in charging upon the prisoner's statement the court used this language: "They may believe it in whole or in part, or they may disregard it entirely, or they may believe it in preference to the sworn testimony in the case, if they see proper to do so. It is a question entirely for you to say just what weight and credit, *if any*, you will give to the statement." In *Smith v. State*, 8 Ga. App. 680, 682 (70 S. E. 42), this court said: "It must be understood that the jury has the right to believe the accused's statement in whole or in part, or to disbelieve all of it; they may believe part of it in preference to the testimony, and then disbelieve other parts even though there is no contradictory testimony." The words, "if any," did not unduly minimize the importance of the statement, and this court will not assume that they were uttered in such a way as to have this effect. However, as repeatedly held, both by the Supreme Court and this court, the practice of confining the charge on this subject to the exact language of the statute is much better.

4. Error is assigned upon the following charge: "The title to the land in question will not in any way be affected by your verdict in this case. We can not settle disputes as to titles to land in this court." The complaint is, not that the instruction is abstractly wrong, but that the court should have charged the jury to consider whether at the time the fence was destroyed the accused bona fide claimed the land. We have read the entire charge carefully, and we think the instructions in reference to the guilt or innocence of the accused were sufficient, in the absence of proper request for a more specific statement of his contentions. The charge could not have been prejudicial to the accused, but was rather more harmful

to the State, because the accused introduced no evidence of his title, and the prosecutor did. In this respect the case differs from *Hateley v. State*, 118 Ga. 79 (44 S. E. 852).

5. Complaint is made of the following extract from the charge: "The court charges you further that should you find that the defendant did injure or destroy the fence in question of W. J. Broadhurst's, you would be authorized to presume that such injury and destruction was done maliciously and wilfully, and you should so find, unless this presumption has been rebutted to your satisfaction." We find no error in this instruction. If the fence was in fact Broadhurst's, and at a place where he had a right to put it, proof that the accused injured the fence in the manner described in the indictment would cast upon him the onus of proving that he destroyed the fence, honestly believing he had a right to do so. See *McClurg v. State*, 2 Ga. App. 624 (58 S. E. 1064).

6. It was not error, under the evidence, to instruct the jury not to consider any of the prosecutor's subsequent acts. The charge sufficiently covered the issues, in the absence of a request for more explicit instructions. *Judgment affirmed.*

2513. PETERS, administratrix, v. QUEEN INSURANCE CO.

PER CURIAM: This case is fully controlled by the instructions contained in the opinion of the Supreme Court upon the question raised by the record and certified to that court. Under that opinion the judgment of the lower court must be reversed. 137 Ga. 440 (73 S. E. 664).

Judgment reversed. Pottle, J., not presiding.

DECIDED FEBRUARY 12, 1912.

Action on insurance policy; from city court of Moultrie—Judge McKenzie. February 26, 1910.

J. A. Wilkes, Shipp & Kline, for plaintiff.

King & Spalding, E. Marrin Underwood, for defendant.

2984. UNITED STATES CASUALTY CO. v. NEWMAN.

PER CURIAM: The question of jurisdiction raised by the record having been certified by this court to the Supreme Court for instruction, and that court having, in an opinion handed down January 12, 1912, de-

cided that "the city court of LaGrange had not acquired such jurisdiction of the defendant as would authorize it to proceed to try this action and to render a judgment against the defendant thereon," the judgment of the city court must be reversed. 137 Ga. 447.

Judgment reversed. Pottle, J., not presiding.

DECIDED FEBRUARY 12, 1912.

Action on insurance policy; from city court of LaGrange—Judge Harwell. August 27, 1910.

Slaton & Phillips, Hatton Lovejoy, for plaintiff in error.

W. T. Tuggle, contra.

3279. GRACE, for use, etc. v. FINLEYSON.

1. In order for a levying officer suing for the use of a plaintiff in *fi. fa.* upon a forthcoming bond to recover, he must show both breach and damage. There is a breach if at the time and place of sale the property is not delivered, or if it is delivered in a damaged condition. However, the obligor in the bond has the right to deliver the property, though it may have been damaged while in his possession, and if he redelivers it in this condition, and it is worth more than enough to bring the amount due on the *fi. fa.*, while there has been a breach of the bond, there is no damage; hence, no recovery can be had upon the bond.
2. Where machinery or other cumbersome personalty of like nature is levied on, the levying officer need not move it, or cause it to be moved, to the court-house where it is to be cried off and sold, provided that he gives notice accordingly in his advertisement of the sale. Where the obligor in a bond given for the forthcoming of such property does not move it from the place where it is levied on, and the levying officer advertises that it is to be situated there at the time of the sale, and the claimant leaves it there and it so remains until the time of sale, no breach of the bond can be claimed, though the obligor has made no actual tender of it to the levying officer.

DECIDED JANUARY 15, 1912. REHEARING DENIED FEBRUARY 12, 1912.

Certiorari; from Pulaski superior court—Judge Martin. February 22, 1911.

H. F. Lawson, for plaintiff in error.

T. C. Taylor, H. E. Coates, contra.

POWELL, J. Grace, as county court bailiff of Pulaski county, levied on an engine, boiler, and other fixtures of a sawmill, under an execution issued from the county court in favor of Mitchell and against the firm of Brown & Smith. Finleyson filed a claim. The claim having been withdrawn, the bailiff advertised the property for sale, the advertisement reciting that the property would be sold

at public outcry, at the court-house, within the legal hours of sale, on the first Tuesday in April, but that the "property being difficult and expensive to transport, it will not be carried to the place of sale, but may be seen and examined at the sawmill of the said J. L. Brown, which is located on the line of the Gulf Line Railway, a quarter of a mile south of Millerville, Ga." The property had never been moved from the place where the levy was made, and was still there, at the place stated in the advertisement, when the time of sale arrived. The bailiff, on the day of the sale, claimed that there had been a breach of the bond by failure to redeliver the property in the condition in which it was when it was levied on, and filed in the city court of Pulaski county a suit upon the bond, for the use of the plaintiff in *fi. fa.* It appeared at the trial that the plaintiff did not actually tender the property to the bailiff and that the bailiff took no steps to repossess himself of it, but that it was in fact at the place designated in the advertisement at the time of sale, and that, while it had been injured by a fire which occurred while it was in the claimant's possession, it was still worth a great deal more than the amount of the *fi. fa.* against it, and that it would have brought more than that amount if offered for sale by the bailiff. The jury, under instructions from the judge of the city court, found for the defendant, and the bailiff brought certiorari. The judge of the superior court, on the hearing of the certiorari, sustained it and remanded the case to the city court for another trial, with instructions that in order to constitute a performance of the conditions of the bond for a delivery of the property, actual tender must be made, and that notice of readiness to deliver, or the fact that the property was actually ready for delivery at the time and place of sale, is not a satisfaction of the condition; and, unless defendants can show an actual tender of the property, or that the levying officer waived an actual tender or repossessed himself of the property, that a verdict be directed for the plaintiff. To this judgment the plaintiff (that is, the constable suing for use) has excepted, alleging as error that the judge of the superior court should have rendered final judgment in his favor, and should not have remanded the case for a new trial.

1. To our minds, there is error in the court's judgment, but not against the excepting party. We think that the judgment rendered in the city court was the correct determination of the case. In or-

der to recover on a forthcoming bond, two things must be shown,—breach and damage. Breach is shown wherever it appears that at the time and place of sale the obligor in the bond failed to deliver, according to his contract, all of the property in as good condition as he received it in; and in this case a breach of the bond was shown when it appeared that the property had been damaged while in the claimant's possession. But if, as we shall directly attempt to show, there was a compliance with the bond save only in respect to the condition of the property, the plaintiff can not recover in this case, because there was no damage; since the property, even in its depreciated condition, was worth considerably more than enough to satisfy the plaintiff's demand. All this is provided for in the Civil Code (1910), § 6043. Under that section the obligor in the forthcoming bond may deliver the property, notwithstanding it is not in as good condition as it was in when he received it, and is liable upon his bond for damages for deterioration, provided that in no case can damages be obtained upon the bond beyond what is necessary to satisfy the execution.

2. In our judgment, the judge of the superior court was in error in holding, under the particular facts of this case, that there was a total breach of the bond because the claimant made no actual tender of the property, though the bailiff did not agree to waive tender and did not repossess himself of the property. It must be remembered that the bailiff's seizure of the property was constructive only. He did not take it and carry it away from where it was situated. When the claimant gave bond he did not move it. If he had moved it, all that would have been necessary on his part would have been for him to bring it and put it where the bailiff said for him to put it, according to the advertisement of the sale. The bailiff's advertisement was public notice to him, as well as to the world, that while the actual selling or crying off of the property would take place at the court-house, the property would not be brought there, but was to remain and to be delivered to the purchaser at the mill site where it was situated. When the day and hour of sale arrived, the claimant had the property at the very place at which he ought to have had it. Just what more he could have done we do not see. Counsel for the plaintiff in error say that he should have tendered it to the bailiff at that hour. Does he mean that he should have put this heavy machinery upon vehicles and have brought it to where

the bailiff was and have offered it to him at the court-house? We think not. The bailiff, following the express provisions of the law, had advertised that the property should be situated, at the time of the sale, at the mill site. He could not have moved the property there, for it was already there. Should the claimant then have gone to the court-house and have taken the bailiff and carried him to the property? We think not. The bailiff was needed at the court-house door to cry off the property there. Was it necessary for the claimant to say to the bailiff, "I tender you the property"? We think not; for a tender of property can not be constituted by mere words; and if the property had not been at the place where it should have been, such words would have been wholly ineffectual for any purpose. By advertising the property for sale at the very place where the claimant had it, we think that the bailiff had waived any further act on the defendant's part. If the claimant had been in any wise resisting the bailiff's control or right of control over the property, a different question might be presented; but nothing of that kind appears. A similar proposition to the one here involved was decided in the case of *Willis v. Chowning*, 18 Tex. Civ. App. 625 (46 S. W. 45), where it was held that if a sheriff made what is known as a range levy, that is, a levy upon animals running on the range, by mere constructive seizure, actual redelivery was not necessary in order to satisfy a forthcoming bond, provided that at the time of sale the animals were upon the range where the constructive levy had been previously made.

As the defendants in the forthcoming bond have filed no exceptions to the granting of a new trial, we shall not reverse the judgment on that ground, but we refuse to reverse it on the exceptions filed by the plaintiff in the bond.

Judgment affirmed.

3444. CENTRAL OF GEORGIA RAILWAY CO. *v.* MCGUIRE.

HILL, C. J. 1. The motion for a new trial challenges the correctness of the charge that "moral and reasonable certainty is all that can be expected in legal investigations," as applicable to a civil case. This is a general principle, codified in section 5730 of the Civil Code (1910), defining the amount of mental conviction required in all cases, and when this instruction was followed by the statement contained in the same section, "that in all civil cases a preponderance of the testimony is con-

sidered sufficient to produce such mental conviction," it was not injuriously inapplicable to the civil case on trial. 7 Michie's Enc. Dig. Ga. Rep. §§ 654, 655, par. 6.

2. The following excerpt from the charge is excepted to: "The burden of proof in this case is upon the defendant. It is incumbent upon him to establish by proof the material allegations of his petition that are not admitted by the defendant. After proving the fact and degree of the injury, if the plaintiff will show himself not to blame, the law then presumes, until the contrary appears, that the defendant company was to blame; or if he will show, on the other hand, that the defendant company was to blame, the law presumes, until the contrary appears, that the plaintiff was not to blame. So that, to make a prima facie case and change the burden of proof, the plaintiff need not go further than to show by evidence one or the other of these two propositions,—either that the plaintiff was not to blame, or that the defendant was to blame. The defendant company, taking at this stage the burden of proof, can defend successfully by disproving either proposition. The disproof of both is not necessary, but until one or the other shall be overcome, the defense is not complete." *Held*, no error for any reason assigned, or for any other reason. Civil Code (1910), §§ 2780, 5746; *Georgia Railroad Co. v. Kennedy*, 58 Ga. 489; *Hopkins on Personal Injuries*, §§ 39, 67, and cases cited.
3. The instructions excepted to in the third and fourth grounds of the amended motion for a new trial, to the effect that the jury were the exclusive judges of the evidence and the credibility of the witnesses, and the rules there given for determining as to credibility, are substantially in the language of the code, and, in the absence of any request for a more specific charge on the subject, were sufficient. Civil Code (1910), § 5883; *Quiggle v. Vining*, 125 Ga. 100 (54 S. E. 74); *Greer v. State*, 6 Ga. App. 785 (65 S. E. 802).
4. The following excerpt from the charge of the court is excepted to: "If a person is wrongfully placed in a position of peril, whereby he is led to make a reasonable and natural effort to escape the threatened danger, the party so placing him in such position is responsible for the consequences of such effort." *Held*: (1) Correct as an abstract principle of law. (2) Applicable to the facts of the case sub judice. (3) Not erroneous for any of the reasons assigned. *Self v. Adel Lumber Co.*, 5 Ga. App. 846 (64 S. E. 112); *Southwestern Railroad Co. v. Paulk*, 24 Ga. 356; *Georgia Ry. & Elec. Co. v. Gilleland*, 133 Ga. 629 (66 S. E. 944).
5. In the absence of a timely written request, it is not error to fail to charge on the rules of law governing the impeachment of witnesses; and this is true although the witness alleged to have been successfully impeached was the plaintiff, and his right to recover depended on the truth of his evidence.
6. The exception to the charge on the rule for estimating damages for pain and suffering, and the measure of damages in such cases, is without merit. The charge on this subject was substantially in accord with repeated rulings of the Supreme Court. *Hopkins on Personal Injuries*, 658-62, and cases cited.

7. The exceptions to the instructions contained in the 8th, 9th, 10th, 11th, 12th, and 13th grounds of the amended motion for new trial, when considered in connection with the general instructions, are without merit.
8. On giving the following requested instruction, "If the plaintiff receipted for the rule book and received a copy of it, then he was bound to know the rules," it was not error to qualify it by adding, "if he had time to read and study them before the accident." It is the duty of an employer not only to give notice of the existence of rules, but so to promulgate them as to afford an employee a reasonable opportunity of ascertaining their terms. *Port Royal Ry. Co. v. Davis*, 95 Ga. 292 (3), (22 S. E. 833).
9. The evidence in behalf of the plaintiff showing permanent injuries, there was no error in charging in the form suggested in the case of *Florida Central R. Co. v. Burney*, 98 Ga. 1 (26 S. E. 730), as to the method for estimating the damages, and the use of the mortality and annuity tables. *Savannah, F. & W. Ry. Co. v. Austin*, 104 Ga. 614 (30 S. E. 770).
10. An exception to the charge as a whole raises no question for decision. The alleged errors specifically pointed out under this general exception are without any substantial merit, the instructions as a whole being fair, full, and correct on all the issues made.
11. The exceptions in this case are numerous, but without novelty or general interest. Considered in the light of the facts and the well-settled rules of law applicable thereto, we have not discovered any material error. The verdict (for \$7,000) is large and generous, but not so manifestly excessive as to show bias, prejudice, or mistake on the part of the jury. The evidence proves that the railroad company was liable in damages, that the plaintiff received serious and permanent injuries, and the amount of the verdict has been approved by the trial judge. No reason is shown for the interference of this court.

Judgment affirmed.

DECIDED JANUARY 15, 1912. REHEARING DENIED FEBRUARY 12, 1912.

Action for damages; from city court of Floyd county—Judge Reece. May 4, 1911.

J. Branham, Maddox & Doyal, for plaintiff in error.

J. M. Hunt, Dean & Dean, Lipscomb, Willingham & Wright, Seaborn Wright, contra.

3551. BARNES COAL CO. v. SOUTHLAND KNITTING MILLS.

HILL, C. J. 1. A contract contained the following clause: "The J. R. Barnes Coal Company hereby agrees to sell and ship to the Southland Knitting Mills forty cars straight run of mine coal from Brushy Mountain Coal Mines, to be delivered at the rate of three or four cars per month." The trial judge construed this clause as follows: "A contract of delivery of forty cars of coal to be delivered at the rate of three or four cars per month would imply that there would be required from ten

to twelve months in delivery at the rate of the three or four cars per month, it being the evident intention of the parties that the shipments should be at intervals comparatively regular." *Held*, a reasonable and proper interpretation.

2. Irrespective of the foregoing clause of the contract, there was evidence upon which the jury could have found that the contract had been rescinded by mutual consent, so far as the two cars of coal were concerned.

Judgment affirmed.

DECIDED JANUARY 15, 1912. REHEARING DENIED FEBRUARY 12, 1912.

Appeal; from Bibb superior court—Judge Felton. June 5, 1911.

R. S. Wimberly, Mallary & Wimberly, for plaintiff in error.

Hardeman, Jones, Callaway & Johnston, contra.

3570. DOUGLAS v. ROGERS.

HILL, C. J. 1. Where an architect sued on quantum meruit, in the absence of contract, to recover for his services in drawing plans and preparing specifications for the erection of a house, and the main issue of fact was as to the cost of the building to be erected in accordance with the plans and specifications prepared by him, it was not error to admit testimony of a general custom among architects not to guarantee the exact cost of buildings to be constructed on the plans and specifications furnished, but only to make an approximate estimate of the cost.

2. Where an architect is employed by the owner of land to prepare plans and specifications for the construction of a building thereon, and does so, and the owner decides not to have the building erected, because of the estimated cost, but nevertheless retains the plans and specifications, in the absence of any guaranty as to the cost of the building, or agreement as to his compensation for preparing the plans and specifications, the architect would be entitled to recover the reasonable value of his services in preparing and furnishing the plans and specifications.

3. Where the plaintiff voluntarily reduced the amount of a money verdict in his favor by writing off a part thereof, an exception that the verdict as rendered, and before its reduction by the voluntary act of plaintiff, was excessive, is without merit, unless the verdict as reduced was excessive.

4. No error appears, and the verdict is amply supported by the evidence.

Judgment affirmed.

DECIDED JANUARY 15, 1912. REHEARING DENIED FEBRUARY 12, 1912.

Appeal; from Fulton superior court—Judge Ellis. April 22, 1911.

Alex. W. Stephens, for plaintiff in error.

Lavender R. Ray, contra.

3815. RIVERS v. THE STATE.

- HILL, C. J. 1. The objections to disconnected excerpts from the charge are without merit, when considered with the instructions in their entirety.
2. The law of voluntary manslaughter was applicable to reasonable deductions from the evidence.
 3. The written request to charge was substantially covered by the general charge.
 4. It was not material error to permit a witness, after describing the location of the fatal wound on the body of the decedent, to state that the location of the wound indicated the position of the decedent when shot.
 5. No error of law appears, and there was evidence to support the verdict.

Judgment affirmed.

DECIDED JANUARY 15, 1912. REHEARING DENIED FEBRUARY 12, 1912.

Conviction of voluntary manslaughter; from Putnam superior court—Judge J. B. Park. October 16, 1911.

Eugene M. Baynes, for plaintiff in error.

Joseph E. Pottle, solicitor-general, contra.

3884. WOODWARD v. THE STATE.

HILL, C. J. No error of law is complained of, and the evidence fully supports the verdict.

Judgment affirmed.

DECIDED JANUARY 30, 1912. REHEARING DENIED FEBRUARY 12, 1912.

Indictment for sale of liquor; from Decatur superior court—Judge Frank Park. November 16, 1911.

G. G. Bower, for plaintiff in error.

W. E. Wooten, solicitor-general, *F. A. Hooper*, contra.

3218. HUBBARD v. SHAW.

- RUSSELL, J. 1. There was a direct conflict between the evidence for the plaintiff and the testimony of the defendant, but the credibility of the witnesses is a question to be determined by the jury, and the evidence fully authorized the conclusion that the defendant empowered his partner in the land to employ the plaintiff as a real-estate agent to sell the farm in question, giving his partner unlimited discretion as to the terms and conditions of the sale, and that the real-estate agent fulfilled his contract by finding a purchaser who was willing, able, and ready to comply with the terms of sale fixed by the partner and ratified by him.
2. The remaining assignments of error are not sufficiently meritorious to warrant a reversal of the judgment refusing a new trial.

- (a) The hearsay testimony was not injurious to the defendant, in view of the testimony of the defendant's partner that he was satisfied as to the willingness of the proposed purchaser to buy, and his ability to pay for the partnership farm.
- (b) The statement of counsel for the plaintiff, to the effect that Kelly, one of the codefendants, had tendered one half of the commissions sued for, and that none of the costs should be taxed against him, did not amount to a release of the other codefendant; and even if the statement was prejudicial to the plaintiff in error, no ruling of the lower court was invoked thereon, and consequently that phase of the exception presents nothing for the consideration of this court.

Judgment affirmed. Pottle, J., not presiding.

DECIDED JANUARY 30, 1912. REHEARING DENIED FEBRUARY 12, 1912.

Complaint; from city court of Tifton—Judge R. Eve. January 10, 1911.

R. E. Dinsmore, B. P. Gaillard Jr., for plaintiff in error.
Fulwood & Murray, Hendricks & Christian, contra.

3647. HICKS v. MOYER.

1. Neither section 4172 of the Civil Code (1910), providing that adverse possession of personalty for four years gives a title by prescription, nor section 4496, providing that actions for injuries to personal property shall be brought within four years, nor any other provision of the code, properly construed, limits the period within which suits to recover personal property may be brought.
2. A valid statute of this State in existence at the date of the adoption of the code, but omitted therefrom through mistake or oversight, is still of force, unless expressly or by necessary implication repealed by a subsequent statute, or by some provision of the code.
3. Section 2 of the limitation act approved March 6, 1856, providing that "all suits for the recovery of personal property, or for damages for the conversion or destruction of the same, shall be brought within four years after the right of action accrues, and not after," though omitted from the code, is still of force, having been omitted by mistake or oversight, and there being nothing in the code, or in any subsequent act, which expressly or by necessary implication repeals this section.
4. In a trover case, demand and refusal are necessary only as evidence of conversion, and need not be proved where conversion is otherwise shown.
5. No facts sufficient to relieve the action from the bar of the statute of limitations are alleged, and the court did not err in dismissing the petition, upon a demurrer raising the point that the action was barred.

DECIDED FEBRUARY 12, 1912.

Trover; from city court of Atlanta—Judge Reid. May 13, 1911.

Leon C. Greer, for plaintiff. Moore & Branch, for defendant.

POTTLE, J. On February 23, 1911, Hicks filed an action of trover in the city court of Atlanta, against Moyer and his wife, seeking to recover possession of certain insurance policies and other documents alleged to be the property of the petitioner. The petition averred, that about June 15, 1905, the petitioner left with the defendants, for safe-keeping, a trunk containing the property in question; that about five weeks later he called for the trunk and contents, and upon inspection discovered that the property sued for had been removed. "Petitioner then and there demanded the return of the same, which said defendants refused, and it was not until the year 1910 that he discovered that the fraudulent removal of the same was perpetrated by said defendants." The trial judge dismissed the petition, on a demurrer raising the point, amongst others, that the action was barred by the statute of limitations; and error is assigned on this judgment.

1. The action of trover in this State is purely statutory, and is available in any case in which trover, replevin, or detinue could have been employed at common law. *Mitchell v. Georgia & Alabama Railway*, 111 Ga. 760 (36 S. E. 971, 51 L. R. A. 622). The question is whether the period within which this statutory action may be brought is limited by any statute or law of this State. Section 4172 of the Civil Code (1910), providing that adverse possession of personal property for four years shall give a title by prescription, is manifestly not a statute limiting the period within which suit can be brought; since a prescriptive title to personalty by four years possession, like a claim of prescription to realty, must be specifically pleaded as a substantive defense. Section 4496 of the Civil Code (1910) is confined to suits "for injuries" to personalty, and does not limit the right to sue for the *recovery* of such property. The wrongful conversion of personal property does not necessarily cause injury to the property. On the contrary, property may enhance in value while in the hands of one who tortiously withholds it. See *Blocker v. Boswell*, 109 Ga. 237 (34 S. E. 289). There is in the code no provision which undertakes to fix a period within which suits to recover personal property must be brought.

2, 3. The act approved March 6, 1856 (Acts 1855-6, p. 233), was a general limitation statute, fixing the periods of time within which suits of various classes must be brought. Section 4 of that

act is now embodied in the Civil Code (1910), § 4496. Section 1 provided that suits for the recovery of real estate shall be brought "within seven years after *adverse possession* commences, and not after." Section 2 provides: "All suits for the recovery of personal property, or for damages for the conversion or destruction of the same, shall be brought within four years after the right of action accrues, and not after." Neither section 1 nor section 2 of this act appears in the code. The codifiers evidently rightly thought that, in view of other provisions of law in reference to title to land by prescription, it was unnecessary to codify section 1 of the act in the phraseology there set out. It seems that they thought also that the law now embodied in the Civil Code (1910), § 4172, in reference to four years adverse possession of personalty, and in § 4496, in reference to suits for injuries to personalty, rendered proper the omission of section 2 of this act from the code. That the compilers of the code of 1895 were of the opinion that the law embraced in these two sections created a limitation upon the right to sue in trover seems to be clear, from the fact that in the index, under the title, "Trover," and subtitle, "within what time to be brought," the sections of the Code of 1895 containing the provisions of law now in §§ 4172 and 4496 of the Code of 1910 are cited. The same is true of the codes of 1873 and 1882. It is to be noted that Judge Hopkins, in his Code of 1910, omitted this reference, as did the compilers of the first two codes (1861 and 1867). In *Blocker v. Boswell*, supra, Mr. Justice Lewis called attention to the fact that section 2 of the act of 1856 was omitted from the code, and said: "We think, therefore, that the codifiers purposely left out the statute of limitations as to trover, considering it was for all practical purposes embodied in the section of the code on the subject of adverse possession of personalty for four years. There is as much reason in saying that section 3898 of the Civil Code, fixing a limitation for actions of trespass upon or damages to realty, applies to suits for the recovery of realty, as there is to say that the following section, with reference to injuries to personalty, applies to *suits* for the recovery of personalty. While this court, as above indicated, has recognized that an action of trover is barred in four years, yet none of these decisions were based upon the fact that the question was controlled by the section of the code relating to injuries to personalty."

It seems to us that the codifiers acted under a misapprehension. The radical difference between the verbiage of section 1 of the act of 1856, relating to real property, and section 2, relating to personalty, is apparent. In order for a suit to recover realty to be barred after seven years, the possession must have been adverse; whereas there was no such limitation in reference to suits to recover personalty. The codifiers evidently did not give due weight to the difference in language between these two sections of the act.

It does not follow, however, that, because section 2 of the act of 1856 was omitted from the code, it is not still the law. The codifiers had no authority to omit from the code a valid existing statute. While every constitutional provision in the code became law by virtue of the adopting act, nevertheless, a valid statute omitted from the code, either purposely or by oversight, is still the law, unless expressly or by necessary implication repealed by some provision of the code or a subsequent statute. *Georgia R. Co. v. Wright*, 124 Ga. 608 (5), (53 S. E. 251). As there is nothing in the code, or in any subsequent act, which conflicts with section 2 of the act of 1856, we hold that this section is still of force.

4, 5. In a trover case, demand and refusal are necessary only as evidence of a conversion. *Thompson v. Carter*, 6 Ga. App. 606 (65 S. E. 599). In the present case, possession having been voluntarily surrendered for an indefinite time, demand and refusal were necessary to show conversion. The statute began to run from the date of the demand and refusal, and as the petition was filed more than four years after the date of the demand and refusal, the action was barred. The petition must be construed most strongly against the pleader. The averment that it was not until the year 1910 that the plaintiff discovered the fraudulent removal of his property can not save the petition, in view of the other allegation, that in 1905 he examined the trunk, saw that the documents sued for had been removed, demanded their return, and the defendants refused to comply. Without reference to other grounds of demurrer, the trial judge rightly held that the action was barred.

Judgment affirmed.

3650. COX v. McKINLEY.

1. In a suit on a promissory note, where the defendant admitted the execution of the note and that the plaintiff was the lawful holder, and assumed the burden of establishing an affirmative defense, it was erroneous to charge that the burden was on the plaintiff to make out his case by a preponderance of the evidence. A prima facie right to recover having been admitted and the burden assumed by the defendant, this instruction was calculated to mislead and confuse the jurors, and induce them to solve any doubts by finding against the plaintiff, especially as the evidence was close and a verdict for either party would have been authorized.
2. The evidence of a party as a witness on a previous trial of the case, contained in a brief of the evidence agreed to by his attorney and approved by the court and filed as a part of his motion for a new trial, is competent and admissible for the purpose of impeachment, proper preliminary proof for its introduction having been made.

DECIDED FEBRUARY 12, 1912.

Complaint; from city court of Cartersville—Judge Foute. June 24, 1911.

M. C. Few, for plaintiff.

Thomas W. & Watt H. Milner, for defendant.

HILL, C. J. Cox sued McKinley on two promissory notes, alleged to have been given for the rental of land therein described for the year 1909. The defendant admitted the execution of the notes and set up, as a defense, that before the time arrived when he was to take possession of the land rented, he notified the plaintiff that he would be unable to carry out his contract, and thereupon the plaintiff rerented a portion of the land to other tenants and cultivated the remainder himself; and the defendant sets up these acts of the plaintiff as amounting in law to a rescission of the rental contract, and says that he was thereupon released from all liability on the notes. On the trial the testimony in behalf of the defendant tended to prove his defense. This defense was met by evidence in behalf of the plaintiff which tended to show that he had refused to release the defendant from the rental contract, and that in rerenting the land and cultivating the portion not rented, he did so under the express direction and authority of the defendant, who promised him that he would be responsible for any balance that might be due on the rent notes, over and above what the plaintiff had realized from the rerental of the land. The plaintiff further contended that even without this direction and promise, it was his

duty, under the law, to lessen the damages, and that in pursuance of this obligation he had lessened the damages to the defendant, to the extent of half of the amount of the rent notes, by renting some of the land, and now claimed only the other half due on the notes. On the issue thus presented, the evidence was in sharp conflict, and a verdict for either party would have been authorized. The law applicable to this issue was correctly charged.

Unquestionably, the plaintiff, after the defendant's renunciation of the rental contract, was at liberty to treat the renunciation as a breach of the contract and to sue for any damages he might have sustained by reason of the breach, treating the contract as still binding. *Smith v. Georgia Loan Co.*, 113 Ga. 975 (39 S. E. 410). If, without authority or direction of the defendant, upon the renunciation of the contract by the defendant, the plaintiff had consented either expressly or constructively to the renunciation, it would have amounted in law to a rescission; but, if, on the contrary, he did not by his conduct rescind the contract, but simply endeavored to lessen the damages, under the consent and direction of the defendant himself, he would have been, in law and equity, entitled to recover any balance due on the rental notes. But, as before stated, the law applicable to this issue made by the evidence was fairly and correctly presented to the jury, and the verdict on this issue would have settled the conflict, and, in the absence of any material error leading the jury to find for one party rather than for the other, would not be disturbed by this court. We think, however, that the court in the trial of the case committed two errors, which, in view of the close character of the case on the evidence, entitle the plaintiff in error to another trial.

1. On the trial the defendant admitted the execution of the rent notes, and that the plaintiff was the lawful holder thereof, and he assumed the burden of proving his affirmative defense. Nevertheless, the court charged the jury to the effect that the burden of proof was on the plaintiff to make out his case by a preponderance of the evidence. A prima facie case had been admitted by the defendant; and, therefore, it was misleading and confusing to the jury to instruct them that the burden still remained upon the plaintiff to prove his case to their satisfaction by a preponderance of the evidence. The court should have instructed the jury that in view of the admission of the defendant as to the prima facie right

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of the plaintiff to recover, the burden was upon the defendant to meet this prima facie right by establishing his affirmative defense by a preponderance of the evidence. The evidence on the controlling issue in the case, presented by the defendant's affirmative plea, was close, and presumptively it was prejudicial to the plaintiff, under this state of the evidence, to place upon him a burden from which he had been relieved by the admission of the defendant; and the charge placing this burden upon him may have led the jury to decide the wavering balance in favor of the defendant.

2. The controlling question in the case was whether, upon the renunciation of the contract by the defendant, he had been released from further performance by the conduct of the plaintiff, or whether he had, upon renouncing the contract, authorized the plaintiff to rerent the land, agreeing to pay any balance that the plaintiff might not receive from the rerenting. The plaintiff offered to prove, in support of his contention that he was simply acting under the authority of the defendant in rerenting a portion of the land, an admission which the defendant made on the former trial of the case, contained in the brief of the evidence which had been agreed to by his counsel and approved by the court. This admission is as follows: "I could not move on the land, and he would not release me. In January Mr. Lynch came to me and said there was a man down there who wanted to rent part of this land. I told him to go back and tell Mr. Cox to rent the land out to the very best advantage, to let Will Williams have what land he wanted, and do the best he could with the rest. I had repeatedly told him that he should not lose anything, and I told Mr. Lynch so." The defendant, as a witness, denied that he had made this statement on a former trial, and the record was offered to impeach him by the contradictory statement; the judge excluded it, and the plaintiff excepted. We think this was error (*Cox v. Prater*, 67 Ga. 588); and more especially error in view of the evidence that the Will Williams mentioned in this record had in fact rerented from the plaintiff a portion of the land after the defendant's renunciation of his contract, and the Mr. Lynch referred to was apparently authorized by the defendant to make this statement for him to the plaintiff. Other than as above discussed, we find no material error of law; but, because of these two errors, a new trial is granted.

Judgment reversed.

3656. PRINCE & SONS v. COCHRAN & SONS.

1. Where suit is brought on a promissory note, and the defendant's plea is stricken and judgment entered up against him for the full amount sued for, a bill of exceptions containing a general exception to the final judgment, and an exception to, and a specific assignment of error upon, the ruling striking the plea, sufficiently brings into question the correctness of the ruling.
2. As against an oral motion to dismiss, made at the trial term, a plea to a suit upon a promissory note, distinctly alleging that the defendants have paid to the plaintiffs, either in cash or its equivalent, more than the amount sued for, and that the overpayments were made through mistake and in ignorance of the sum really due on the note at the time the overpayments were made, is good, both as a plea of payment and as a cross-action to recover the overpayments.

DECIDED FEBRUARY 12, 1912.

Complaint; from city court of Cairo—Judge Singletary. July 20, 1911.

J. Q. Smith, for plaintiffs in error.

Roscoe Luke, R. C. Bell, Ira Carlisle, contra.

POTTLE, J. This was a suit upon two promissory notes. The defendants filed a plea setting up that they had paid the plaintiffs more than the amount due on the notes, by \$210.75. It was alleged that the different amounts had been paid to the plaintiffs from time to time upon designated dates, but that the plaintiffs had failed to credit these payments on the notes sued on. It was further averred that the overpayments had been made through mistake and in ignorance of the amount really due. The defendants prayed that they might recover from the plaintiffs the amount thus overpaid. On oral motion at the trial, the judge struck the defendants' pleas and entered judgment for the full amount sued for. Their bill of exceptions contains a special assignment of error on the judgment striking the pleas. Error is also assigned upon the refusal of the court to allow the pleas to be amended "in any respect whatever," but it is not alleged that any amendment was offered, and no copy of the proposed amendment is set out in the bill of exceptions or attached thereto as an exhibit. The bill of exceptions recites that after striking the defendants' pleas, the court rendered a judgment for the full amount sued for, "to which judgment defendants then and there excepted and now except and assign same as error."

1. A motion to dismiss the writ of error, has been made, upon the ground that the assignments of error in the bill of exceptions

are not sufficiently specific. There is no merit in this motion. The proper practice in such cases was laid down by the Supreme Court in the case of *Lyndon v. Georgia Ry. & Elec. Co.*, 129 Ga. 353 (58 S. E. 1047), to the effect that where there is an exception to a final judgment, exception may also be taken to any antecedent ruling made during the trial. Of course, a judgment for the full amount sued for was the inevitable result of the antecedent ruling striking the defendants' pleas, and the real complaint of the plaintiffs in error is, not that final judgment was entered, but that their pleas were stricken. As we understand the ruling of the Supreme Court in the *Lyndon* case, *supra*, the assignments of error in the present bill of exceptions are sufficient to bring before this court the judgment striking the defendants' pleas. The exception to the refusal of the court to allow the defendants to amend will not be considered, because no amendment is set out in the bill of exceptions or attached thereto as an exhibit.

2. Upon special demurrer, a plea of payment is bad, unless it alleges when, how, and to whom payment is made. *Kahrs v. Kahrs*, 115 Ga. 288 (41 S. E. 649). But there was no special demurrer in this case. As against a general demurrer or an oral motion to dismiss, made at the trial term, upon the ground that no defense is set forth, a plea of payment is good which alleges in distinct terms that the defendant has paid to the plaintiff in cash or its equivalent the full amount of the note sued on. The plea in the present case was certainly good as a plea of payment. We are also of the opinion that as against an oral motion to dismiss, the plea and prayer, in so far as a recovery is sought for overpayments, is good. The defendants allege that the money was paid through mistake; that they did not have access to their notes, and, the proper credits not having been made by the plaintiffs from time to time, they were unable to tell just what amount was due on the notes. This plea was subject to special demurrer, but we do not think that it should have been dismissed upon oral motion made at the trial term.

Judgment reversed.

3657. ALEXANDER & SONS v. MORRIS & Co.

- HILL, C. J. 1. The bond upon which suit was brought, while not good as a statutory bond, was good as a common-law obligation. Besides, the defendant, having secured possession of the property levied upon by giving the bond to the levying officer, was estopped from attacking it as invalid. *Wall v. Mount*, 121 Ga. 831 (49 S. E. 778); *Awtrey v. Campbell*, 118 Ga. 464 (45 S. E. 301).
2. The petition as amended set forth a good cause of action, and was not subject to demurrer on any of the grounds alleged. The court properly overruled the demurrer. *Judgment affirmed.*

DECIDED FEBRUARY 12, 1912.

Complaint; from city court of Nashville—Judge Lankford presiding. July 6, 1911.

Hendricks & Christian, for plaintiffs in error.

W. G. Harrison, contra.

3658. BROOKS v. GRIFFIN.

- RUSSELL, J. 1. The evidence was sufficient to authorize the conclusion that the claimant, though she was the wife of the defendant in *fi. fa.*, was the true owner of the horse levied upon. In considering transactions between husband and wife, slight circumstances, under certain conditions, may be sufficient to satisfy a jury of the existence of fraud, but in all such cases the bona fides of the transaction is to be determined by the jury. In the present case it can not be said that the evidence demanded a finding other than that returned by the jury.
2. It is not error for a trial judge, in ruling upon the validity of objections to testimony, to repeat, as he remembers it, the substance of a material portion of the testimony of the witness then upon the stand, and to inquire of the witness whether the court's recollection of the testimony is correct; and the fact that the judge, in ruling upon the admissibility of testimony, states its substance, as being what has been testified (without, however, intimating in any way the weight or credit to be attached to it), does not sustain an assignment of error complaining that the court "intimated and expressed an opinion as to the facts of the case."
3. Evidence on the part of a purchaser of a horse that a designated person had never owned it is not objectionable as being the conclusion of the witness, but is to be treated as the statement of a substantive fact which would naturally rest in the knowledge of the witness as the owner of the horse. As title to personal property may pass by mere delivery, the nature of the title of one in possession of personal property, under such circumstances, is not an opinion, but a matter of fact, resting peculiarly within the knowledge of the party in possession.
4. The excerpts from the charge of the court to which exceptions are taken are adjusted to the evidence, and, though one of these excerpts is erro-

- neous, the exception is not addressed to the error, which is apparent, but not necessarily harmful. The requests to charge, so far as they were pertinent and appropriate, were covered by the general charge.
5. It will not be held reversible error, in the absence of a timely and appropriate request, to omit to instruct the jury upon the burden of proof. *Central Railway Co. v. Manchester Mfg. Co.*, 6 Ga. App. 254 (64 S. E. 1128). Aliter, if the court charges the jury upon the subject of the burden of proof, and errs in placing the burden upon the wrong party. *Cox v. McKinley*, ante, 492 (73 S. E. 751). The court is not required to charge the jury upon the preponderance of testimony unless requested so to do.
 6. The court was not required to charge that if it was shown that the title to the property levied upon was vested in the defendant in fi. fa. at a time prior to the judgment, it was presumed to remain in him until the contrary was shown by the evidence, even though it was undisputed that the defendant in fi. fa. originally bought the horse claimed by his wife. If it was desired that the attention of the jury be directed to this specific point, an appropriate instruction upon the subject should have been requested. *Judgment affirmed.*

DECIDED FEBRUARY 12, 1912.

Levy and claim; from city court of Miller county—Judge Bush.
June 14, 1911.

W. I. Geer, for plaintiff.

3664. STOVALL COMPANY *v.* SHEPHERD COMPANY.

1. The purpose of the act approved August 17, 1903 (Civil Code of 1910, § 3226 et seq.), regulating the sale of "goods, wares, and merchandise in bulk," was to protect creditors against fraudulent sales by debtors. It has no application to a general settlement made by a debtor with creditors, where, by the terms of the settlement, all the creditors agree that the debtor's stock of goods, wares, and merchandise shall be turned over to a third person, who shall sell the same solely for the benefit of the creditors, and where the third person, in pursuance of a common agreement, does sell the stock in bulk and pays over to the creditors, according to the agreed pro rata, all the proceeds of the sale.
2. Where a creditor had consented to the agreement set out in the above headnote, and actually aided the common agent of the debtor and creditors in making the sale of the debtor's stock of goods in bulk, for the purpose of carrying out the agreement, he could not, after the sale had been made, but before the money arising therefrom had been paid over by the purchaser to the common agent and distributed to the creditors, recede from the agreement and, by process of garnishment, subject to the payment of his debt any part of the proceeds of the sale, in the hands of the purchaser. The doctrine of estoppel would apply and forbid the dissatisfied creditor from in any manner interfering with or

preventing the consummation of the agreement to which he had been a consenting party.

3. A decision upon the constitutional objections raised to the act of 1903 (Acts 1903, p. 92) is not necessary to an adjudication of the case; and, besides, they are fully controlled by the ruling of the Supreme Court in *Jaques & Tinsley Co. v. Carstarphen Warehouse Co.*, 131 Ga. 1.

DECIDED FEBRUARY 12, 1912.

Garnishment; from city court of Madison—Judge Anderson.
July 6, 1911.

By consent of the creditors of the Anderson Dry Goods Company, which was insolvent, E. W. Butler took charge of its stock of goods, and, after notice to all the creditors, and by their consent, sold the goods to W. E. Shepherd Company, received the purchase-price, and disbursed it, according to an agreed pro rata, among the creditors. After the consummation of the sale, but before the payment of the money to the creditors, W. W. Stovall Company declined to abide by the agreement which it had made with the other creditors, to accept twenty-five cents in the dollar of the proceeds of the sale, in settlement of its debt, and brought suit against the Anderson Dry Goods Company and Mrs. Anderson, alleging that she was a member of the partnership, and had summons of garnishment served upon W. W. Shepherd Company. Before the summons of garnishment was served, the garnishee paid over the money to E. W. Butler, for disbursement to the creditors of the Anderson Dry Goods Company, and resold all the goods. On proof of these facts, which were set up in the answer filed by the garnishee, the court directed a verdict in favor of the garnishee, on the traverse to the answer; and this judgment is excepted to.

M. C. Few, William H. Fleming, for plaintiff.

Samuel H. Sibley, contra.

HILL, C. J. (After stating the foregoing facts.)

1. It will be seen, from the evidence as above stated, that the Anderson Dry Goods Company was no party to the sale of its stock of goods to Shepherd Company; that this sale was made by Butler, acting for the creditors and by the consent of all the creditors, for the purpose of carrying out their agreement in the premises. The Anderson Dry Goods Company was not to receive any part of the proceeds from the sale of its stock of goods, and did not in fact receive a dollar of the money. It was all paid by Shepherd Company to Butler, and he prorated it according to the agreement

made with and between the creditors. Stovall Company agreed with the other creditors of the Anderson Dry Goods Company to accept twenty-five cents in the dollar from the proceeds of the sale, in settlement of its debt against the Anderson Dry Goods Company, and not only knew of Butler's sale of the stock of goods to Shepherd Company, but assisted him in making the sale. Stovall Company took no steps to stop the sale, and did not actually object to its consummation by Butler, but, after the sale, refused to stand by the agreement as to the general settlement. The facts being as stated; under the general rule of law applicable to cases of garnishment, there could have been no recovery against the garnishee, for Stovall Company, as a creditor, could only enforce against Shepherd Company, as garnishee, such rights as the Anderson Dry Goods Company had against Shepherd Company; and certainly the Anderson Dry Goods Company had no claim against Shepherd Company except for the twenty-five cents in the dollar which the creditors had consented to accept, under the agreement in pursuance of which Anderson Dry Goods Company had turned over the stock of goods to Butler as agent and representative of the creditors. And besides, according to the undisputed evidence, all the money which Shepherd Company had agreed to pay for the stock had been paid to Butler before summons of garnishment was served.

It is said, however, that the sale was fraudulent as to the creditors, under the act of 1903 (Civil Code of 1910, §§ 3226, 3227, 3228), and that the garnishee was liable, although it had paid out the funds. The general rule is as above stated, that the garnishee's liability to the creditor of the principal defendant is conditioned upon his liability to the latter. In other words, a creditor can not reach by garnishment process any assets which his debtor could not recover from the garnishee. In *Jaques & Tinsley Co. v. Carstarphen Warehouse Co.*, 131 Ga. 1 (62 S. E. 82), the exception to this rule is said to be where the garnishee is in possession of the effects of the defendant under a transfer fraudulent as to his creditors. "In such a case, though the defendant can maintain no action against the garnishee, yet a creditor of the defendant may subject the effects in the garnishee's hands by garnishment." And it is insisted that as the sale of the stock of goods belonging to the Anderson Dry Goods Company was "in bulk," it was void for want of compliance with the act of 1903, *supra*, and, therefore, Shepherd

Company was liable as garnishee. The act of 1903 referred to, being in derogation of the common law, is to be strictly construed, and is applicable only to cases which fall clearly within its purview. *Taylor v. Folds*, 2 Ga. App. 453 (58 S. E. 683); *Cooney v. Sweat*, 133 Ga. 511 (66 S. E. 257, 25 L. R. A. (N. S.) 758). The purpose of the legislature in the enactment stated was to protect creditors against a class of sales, frequently fraudulent, which left the creditors of the vendor without any assets with which to pay his debts; or, as expressed in the case of *Cooney v. Sweat*, supra, "When merchants sell their entire stock of goods to one person, without notice of any kind to their creditors, a fraud is frequently perpetrated upon the creditors; and it was the intention of the legislature to afford a remedy to the victims of these fraudulent sales." The evil sought to be remedied was the making of sales by debtors of their stock in bulk, thus depriving creditors of assets of property out of which to make their claims. The statute is aimed at the fraudulent conduct of the debtor as a vendor. It has no application whatever to a bona fide arrangement on the part of the creditors with the debtor to protect themselves by agreeing to a composition of their debts, or to an honest assignment on the part of the debtor for the benefit of his creditors. Under the facts of the present case the Anderson Dry Goods Company did not make the sale of its stock of goods in bulk to Shepherd Company. By agreement of all the creditors it consented that Butler, acting for the creditors, and in a sense for the debtor, should make the sale of the debtor's stock to Shepherd Company. So far as Shepherd Company, the garnishee, knew, Butler was alone the vendor. The Shepherd Company dealt with him alone. There is no evidence that he owed any one, and as Shepherd Company, in the role of purchaser, dealt exclusively with him, there was no creditor to be notified of the sale. But even if the Anderson Dry Goods Company is regarded as a vendor, although unknown to the Shepherd Company as a purchaser, the case is not within the terms of the statute, that "it shall be the duty of every person who shall bargain for or purchase any stock of goods, wares, or merchandise in bulk, for cash or credit, before paying or delivering to the vendor any part of the purchase-price therefor, to demand and receive from the vendor thereof . . . a written statement under oath of the names and addresses of all the creditors of said vendor," etc. Civil

Code (1910), § 3226. And in section 3228 it is provided that, "whenever any person shall purchase any stock of goods, wares, or merchandise in bulk, and shall pay the price or any part thereof, or execute or deliver to the vendor thereof . . . any promissory note or other evidence of indebtedness for said purchase-price," without complying with the act, "such sale or transfer shall, as to any and all creditors of the vendor, be conclusively presumed to be fraudulent." According to the evidence in the case, no part of the purchase-price was to be paid to the Anderson Dry Goods Company, or was in fact ever paid to it as a vendor; and it is undisputed that there was no collusion between any creditor and the debtor. The purchase-price was paid to the creditors of the Anderson Dry Goods Company, who were entitled to receive it under the agreement made by them as to a general settlement. To hold that a sale thus made was within the terms of the act would be equivalent to holding that a sale made substantially by creditors, where they had actually received the proceeds of the sale of the stock of goods, would be in conflict with the only purpose of the act,—to protect creditors,—and this, too, at the instance of one of the creditors, who had agreed with all the other creditors as to the terms of settlement with the debtor, and who had actively co-operated in carrying out these terms. As stated, the purpose of the act is to protect creditors from fraudulent sales by debtors, and not to prevent creditors from making a general settlement with their debtors, nor to protect one creditor at the expense of all the other creditors. Such a construction of the act would render void any bona fide general settlement of creditors with their debtors, and would make invalid any lawful assignment made by a merchant of all of his assets in good faith for the benefit of his creditors.

2. Besides, we think that Stovall Company, by every principle of estoppel, was precluded from setting aside the sale made by Butler to Shepherd Company, or from breaking up the general settlement with the creditors. It had agreed to the sale. According to the evidence, it had aided Butler in making the sale as the representative of all the creditors. It had agreed to accept twenty-five cents in the dollar in settlement of its claim against the Anderson Dry Goods Company, and had also agreed that the sale should be made of the stock of goods through Butler to the Shepherd Company, and should mutually bind all the creditors. One creditor

could not, in the absence of fraud or mistake, recede from this agreement, to the injury of other creditors or for the purpose of breaking up the arrangement which had been accepted and agreed to by all of them. *Stewart v. Langston*, 103 Ga. 290 (30 S. E. 35). To permit Stovall Company, after entering into the agreement, to recede from it, would not only injure the other creditors by breaking up the settlement, which was presumably to their interest, but would probably leave Butler, who represented Stovall Company and the other creditors, under some legal obligation to Shepherd Company; and it certainly would be inequitable and unfair to Butler to permit Stovall Company to leave him in this position after having agreed to the entire transaction and aided him in making the sale of the goods to Shepherd Company. It would be equally unfair to Shepherd Company to require it to pay in full, as garnishee, the debt of Stovall Company against the Anderson Dry Goods Company, in view of the fact that Stovall Company had been instrumental in inducing Shepherd Company to buy the stock of goods. The doctrine of estoppel is fully applicable to the facts of this case. Civil Code (1910), § 5736.

3. The views above expressed render immaterial the objections raised as to the constitutionality of the act of 1903—Civil Code (1910), § 3226 et seq. Besides, this court has previously certified to the Supreme Court the same constitutional objection, and the act has been fully sustained (*Jaques & Tinsley v. Carstarphen*, supra). There is nothing in the decision of the Supreme Court of the United States in the case of *Bailey v. Alabama*, 219 U. S. 239 (55 L. ed. 191), which contravenes the ruling of the Supreme Court of this State in upholding the act in question.

Judgment affirmed.

3668. FIRST NATIONAL BANK OF FITZGERALD v. SPICER.

1. The question of the sufficiency of description of property in a mortgage is one of law, for the court; that of the identity of the property mortgaged is one of fact, to be decided by the jury. In the present case the court erred in permitting the jury to decide, as an issue of fact, whether or not the description of the property mortgaged was sufficient to charge the claimant with notice.

- (a) The description, "one mouse-colored mare mule, five years old," was, as matter of law, sufficient.
2. Where a mortgage has been duly recorded, and no question is raised as to the validity of the record, it is error, upon the trial of a claim case based upon a levy of the mortgage *fi. fa.*, to permit the claimant to testify that he had no notice of the mortgage.
 3. In the trial of such a case it is also error to permit the mortgagor to testify that at the time the mortgage was executed, the mortgagee made an express warranty as to the soundness of the property mortgaged.
 4. In the trial of such a case it was inaccurate and misleading to charge the jury that the burden was on the plaintiff, the transferee of the mortgage, "to prove every material allegation which they allege in their action, or mortgage foreclosure, levies, and so forth, which you now have before you for your consideration."
 5. Construing the evidence all together, in the light of the principles laid down in the foregoing headnotes, the verdict in favor of the claimant was unauthorized.

DECIDED FEBRUARY 12, 1912.

Levy and claim; from city court of Fitzgerald—Judge Wall. July 29, 1911.

Haygood & Cutts, for plaintiff. *H. J. Quincey*, contra.

POTTLER, J. A claim was filed by Spicer upon the levy of a mortgage *fi. fa.* The mortgage described the property as "one mouse-colored mare mule, five years old." The execution and the levy followed this description. The mortgage was duly recorded and had been transferred for value before maturity to the bank. The claimant prevailed at the trial and the plaintiff's motion for new trial was overruled.

1. It is not essential that the description of property in a mortgage should be so definite as that the property can be identified upon such description alone. It is sufficient if the description can be made certain by the aid of extrinsic evidence. The description, "one sorrel horse, seven years old," in a contract of conditional sale, has been held to be sufficiently definite to charge with notice one who purchases the horse which is the subject-matter of the sale. *Beaty v. Sears*, 132 Ga. 516. The sufficiency of the description in the present case was a question of law, for the court, and should not have been submitted to the jury as an issue of fact. It was conceded that the mule levied on was the one described in the mortgage. Had there been any issue as to this fact, it would have been proper for the court to submit to the jury the question of the identity of the mule levied on. *Collier v. Vason*, 12 Ga. 440 (3); *Farkas v. Duncan*, 94 Ga. 27; *Reynolds v. Jones*, 7 Ga. App. 123. The

court should have held, as a matter of law, that the description in the mortgage involved in the present case was sufficiently definite to charge the claimant with notice that the property in dispute had been mortgaged by the defendants in fi. fa. to Crawley, and it was error to charge the jury that it was for them to say whether or not the description was sufficiently definite to enable the claimant to have ascertained that the mule which he bought was the mule which passed under the mortgage from the defendants in fi. fa. to Crawley.

2. The mortgage having been duly recorded before the purchase by the claimant, it was error to permit him to testify that at the time of the purchase he had no notice of the mortgage. The law charged him with notice, and it was entirely immaterial whether or not at the time of his purchase he had actual notice that the mortgage had been given.

3. The undisputed evidence showed that the bank was a purchaser for value of the mortgage before its maturity. The bank was not bound by any contract or agreement not expressed in the mortgage, made between the mortgagors and the mortgagee, unless, of course, it had actual notice of such agreement at the time of the transfer of the mortgage. In the present case it was prejudicial error against the bank to permit one of the mortgagors to testify that at the time the mule was purchased from Crawley, he made an express warranty as to its soundness. This testimony was entirely irrelevant, and did not illustrate the real issue in the case, which was whether or not the property was subject to the mortgage fi. fa.

4. The claimant being in possession of the property at the time of the levy, the burden was on the plaintiff to show either title or possession in the defendant in execution since the debt of the former became a lien upon the property of the latter. Civil Code (1910), § 5170; *Southern Mining Co. v. Brown*, 107 Ga. 264. It was inaccurate and confusing to charge the jury that the burden was on the bank "to prove every material allegation which they allege in their action, or mortgage foreclosure, levies, and so forth, which you have now before you for your consideration."

5. We have carefully read the evidence, and to our minds, in the light of the rulings laid down in the course of the opinion, it is not sufficient to authorize the verdict. *Judgment reversed.*

3673. PATRICK *v.* SHIELDS & SUDDETH.

- HILL, C. J. 1. Where suit was brought for the price of an engine sold under verbal contract, and the evidence for the plaintiff showed that the engine had been delivered to the buyer, who accepted and used it for several months, the court did not err in charging that if this was true, the contract was not within the statute of frauds. Civil Code (1910), § 3222, subsection 7.
2. Grounds in the motion for a new trial not verified will not be considered.
3. The evidence was in conflict on the only issue of fact, to wit, whether the contract was one of sale or of rental, and the law applicable to this issue was correctly charged. The verdict will not be disturbed.

Judgment affirmed.

DECIDED FEBRUARY 12, 1912.

Complaint; from city court of Jefferson—Judge Stark. July 14, 1911.

J. A. B. Mahaffey, John J. Strickland, for plaintiff in error.

P. Cooley, contra.

3676. McMICHEN *v.* BROWN.

- POTTLE, J. 1. An agent to rent has no implied power to bind the landlord by a contract to pay a stipulated sum for improvements to be made by the tenant.
2. One employed as attorney at law to collect a claim for rent can not bind the landlord by a contract to pay for improvements made on the rented premises.
3. A parol ratification by an owner of land of an unauthorized written contract made by an agent, to pay a stipulated price for improvements to be made on the land, will not be effective to bind the principal, when the improvements were made before the ratification took place, and the tenant has not acted on such ratification to his injury. *McCalla v. American Freehold Co.*, 90 Ga. 113; *Palmer v. McNatt*, 95 Ga. 435 (1), 437.
4. Applying the foregoing principles to the facts of the present case, the court did not err in directing a verdict in favor of the plaintiff in the distress-warrant proceeding.

Judgment affirmed.

DECIDED FEBRUARY 12, 1912.

Appeal; from Paulding superior court—Judge Price Edwards. August 9, 1911.

J. J. Northcutt, for plaintiff in error.

F. M. Richards, contra.

3677. PEAVY *v.* CLEMONS *et al.*, administrators.

1. The return of an executor, administrator, or guardian, made to the court of ordinary and allowed by that court, is only *prima facie* evidence in his favor, as to its correctness, and may be impeached by evidence, not only in the court to which it was made, but in any other court having jurisdiction of the parties and of the subject-matter. The burden of proof is upon the party who seeks to impeach the correctness of the return.
2. Where, on appeal to the superior court from the court of ordinary, a paper probated in solemn form as the will of the decedent is declared not to be his will, and, by a consent verdict and decree, the executor named in the paper purporting to be the will is permitted to make a final return to the court of ordinary, as such executor, and, in pursuance of the consent verdict and decree, he does so, and no objection is made to the return, and it is approved and allowed by the court of ordinary, the correctness of the return can nevertheless be subsequently attacked and impeached by evidence, not only in that court, but in any other court in this State having jurisdiction of the subject-matter and the parties. The consent verdict and decree in no sense change the rule of law as announced in the foregoing headnote.
3. On the trial of this case the jury, having been charged by the judge, had remained out several hours, considering their verdict. They were brought into court by direction of the judge, for the purpose of ascertaining whether a verdict could be reached, and the following colloquy occurred: The court: "Mr. Foreman, have you reached a verdict?" Foreman: "No, sir." The court: "How do you stand as to numbers?" Foreman: "Ten to two." The court: "How long have you stood that way?" Foreman: "Some half an hour, I reckon." The court: "How did you stand previously to that time?" Foreman: "About seven to five." The court: "That is encouraging. You seem to be making progress towards a conclusion of the case, and I am glad to hear that you are. Of course, gentlemen, you realize the importance of making verdicts. While I understand at the same time that occasions may arise when jurors are honestly unable to agree, it is the duty, however, of the court, wherever the court has a reasonable hope that you may arrive at a unanimous conclusion, to give you all reasonable opportunity to do that; and that I am glad to do in this case. You can retire, gentlemen." *Held*, error. (1) The tendency of the language used by the judge was to encourage the ten jurors to adhere to their view of the evidence, and to discourage the two jurors in adhering to their view. (2) The two jurors might reasonably have inferred from the language used that in the opinion of the judge it would be their duty to surrender their individual convictions and agree with the majority. (3) Its tendency was to suggest that the jurors might arbitrarily compromise, divide, and yield, merely for the sake of agreement. (4) It amounted to an undue pressure by the judge upon the jury to agree to a verdict. (5) It was a violation of the spirit of the statute which mandatorily prohibits the trial judge from expressing or intimating any opinion on the facts. (6) The evidence was in conflict and about

equally balanced on the issues of fact, and a verdict would have been authorized for either party; hence, the error is of sufficient gravity to require another trial.

DECIDED FEBRUARY 12, 1912.

Complaint; from city court of Vienna—Judge Strozier. August 19, 1911.

This was a suit by the administrators of the estate of D. C. Clemons, deceased, to recover from W. B. Peavy money and property which they allege he received from the estate of D. C. Clemons while acting as an executor under the will of the decedent, and failed to account for. A verdict was returned in favor of the plaintiffs, for a portion of the money sued for; the defendant's motion for a new trial was overruled, and he excepted. It appears, from the evidence, that soon after the death of D. C. Clemons, the defendant produced an alleged will and probated it in solemn form as the will of D. C. Clemons. On a caveat to the probate of this will, there was an appeal from the court of ordinary to the superior court, and in the superior court a consent verdict was taken, finding that the paper offered for probate as the will of D. C. Clemons, deceased, was not the will of D. C. Clemons; and, after allowing certain commissions and expenses to Peavy as executor, it was further found that "said W. B. Peavy, executor as aforesaid, shall make out a final return to the ordinary of Houston county, showing the money and property that has come into his hands as such executor, together with vouchers for all moneys expended and allowed by this verdict;" and a decree was entered accordingly. Peavy made his final returns to the ordinary of Houston county in pursuance of this verdict. No objections were filed as to the correctness of the returns, and in due time they were formally approved and allowed by the ordinary. The defendant in the present suit sets up the verdict, and the returns made by him in pursuance thereof, as *res judicata*, and also insists that these returns could only be attacked in the court of ordinary, or by equitable petition in the superior court. At the conclusion of the evidence the trial judge submitted to the jury only two items claimed against the defendant, holding that there was no evidence to justify a finding against him as to the other items. The jury found in favor of the plaintiffs as to only one of the items submitted. This item was for \$1,030 alleged to have been paid by the widow of the decedent to Peavy while he was acting as executor of the estate. The evidence as to this

item was in direct conflict. The widow testified, that, five days after the death of her husband, she turned over to W. B. Peavy, as executor, \$1,030 belonging to the decedent; that this money consisted of "\$1,000 in gold and \$30 in greenbacks," and was in a "shot sack," where she found it after the death of her husband; and that subsequently she saw the same money in the possession of the defendant's wife, who was counting it. In corroboration of this testimony a grandson of the decedent testified, that he "saw a pretty good bulk of gold money in a shot sack" in the possession of the decedent some time before his death. The defendant testified positively that he had never received this money from the widow, and he further proved that the widow had stated to several persons after the death of her husband that she found no money among his effects; that all the money they had in the house had been stolen therefrom previous to his death, and that since this larceny he had not kept his money in his house, but had put it all in the bank at Unadilla. After the jury had received the instructions of the court and had been out for several hours considering their verdict, the trial judge had them brought into court for the purpose of ascertaining whether a verdict was likely to be reached, and thereupon the colloquy quoted above, in the third headnote, took place.

The motion for a new trial, in addition to the usual general grounds relied upon, specially assigns error on the refusal of the court to direct a verdict in favor of the defendant, on the ground that, as a consent verdict and a decree thereon were established, the matter was *res judicata*; that the returns of the defendant as executor, made to the court of ordinary in pursuance of the consent verdict and decree, and duly approved and allowed by the ordinary, could not now be attacked; that all the heirs, and the plaintiffs as administrators, were parties to this consent verdict and decree, and were estopped from pressing their suit in this court; and that the judge's language, in the colloquy which took place between him and the foreman of the jury, was an improper invasion of the province of the jury, and unduly influenced the jurors in their deliberations.

George & Woodward, Crum & Jones, for plaintiff in error.

Busbee & Busbee, contra.

HILL, C. J. (After stating the foregoing facts.)

1, 2. The verdict and decree relied upon as establishing the defense of *res judicata* is manifestly insufficient for that purpose. Their only effect, after the paper offered for probate had been declared not to be the will of the decedent, was a consent that W. B. Peavy, who had been acting as executor, should make his final returns to the ordinary of the county, showing the money and property that had come into his possession as such executor. This probably would not only have been his right, but his duty, without the consent verdict. There is nothing in this consent verdict which in the remotest degree indicates that these returns were to be accepted as true by the parties at interest. These returns as filed do not show this item of \$1,030 of money, which it is alleged the executor had received from the widow; and the executor denied that he had ever received it. The law is well settled that the final return of an executor, guardian, or administrator to the court of ordinary of his county, although it may have been approved and allowed by the ordinary, is only *prima facie* evidence in his favor, as to its correctness, and may be impeached by evidence, not only in the ordinary's court, but in any other court having jurisdiction of the parties and the subject-matter: the burden of proof being upon the party who seeks to impeach the correctness of the return. Civil Code (1910), § 3994; *Brown v. Wright*, 5 Ga. 29. Judge Warner, in discussing, in the *Brown* case, *supra*, the rule that returns of executors, guardians, and administrators, made to the court of ordinary and allowed by that court, are to be considered only as *prima facie* evidence in favor of such trustees, says, that "creditors, legatees, distributees, and wards may impeach such returns, by evidence, in other courts, the burden of proof being on the party who seeks to impeach them. This, we have no doubt, is the safe and correct rule, for it will not do to say that because an executor, administrator, or guardian, by false and fraudulent accounts, supported by his *ex parte* acts and statements, and thereupon allowed by the court, shall be held conclusive in his own favor. Such a rule would be allowing the party to protect himself, and derive a benefit to himself, from his own fraudulent conduct. In *Fermere's* case Lord Coke said: 'Fraud vitiates all judicial acts, whether ecclesiastical or temporal.'" The rule as here announced by the learned judge remains the same in this State, and is in substance embraced in the

section of the code above cited. The consent verdict and decree relied upon as proving the defense of *res judicata* and estoppel does not by its terms preclude the right of interested parties to attack the returns made by the executor in the court of ordinary; and this attack could be made not only in the court of ordinary, but in other courts having jurisdiction of the subject-matter and the parties. *Dowling v. Feeley*, 72 Ga. 557; *Crawford v. Clark*, 110 Ga. 735 (36 S. E. 404); *Barber v. Woods*, 39 Ga. 643.

3. We come now to discuss the assignment of error based on the colloquy between the judge and the jury, which is set out in full in the third headnote of this decision. It is contended that the language of the judge, and especially the latter part of it, where he said, on being informed that the jury had previously stood seven to five, but then stood ten to two, "That is encouraging. You seem to be making progress towards a conclusion of the case, and I am glad to hear that you are," was an unwarranted invasion of the exclusive province of the jury to determine all issues of fact and to reach a unanimous verdict without any encouragement or assistance from the judge, except such assistance as might be derived from instructions upon the law applicable to the issues made by the evidence; that this statement either influenced, or had a tendency to influence, the minority of the jury to surrender their convictions and accept the opinion of the majority, and tended to impress both minority and majority of the jury with the fact that the judge approved of the conduct of those jurors who previously stood with the minority in going over to the majority; that this statement by the judge not only tended to commend the conduct of those jurors who had left the minority and gone over to the majority, but also tended to discourage the remaining two jurors in holding to their convictions as to what was the truth under the evidence, and to persuade them to abandon their individual convictions and go over to the ten jurors.

We think that the language of the trial judge is justly subject to the criticisms made against it. Each case must be determined upon its own facts, the true test being that wherever the language of the trial judge reasonably permits any interpretation or construction that could influence any one of the jurors to yield his convictions of the truth for the mere sake of an agreement and accept the views of the majority, or wherever the judge suggests that the jurors

might arbitrarily compromise, divide, or yield their individual views in order that a verdict might be found, it constitutes reversible error, since it in some degree detracts from that absolute fairness intended to be secured by jury trials. Neither an individual juror, nor the minority of the jury, should be unduly pressed to surrender his or its convictions merely for the purpose of unanimous agreement. The verdict should be the result which all the jurors have unanimously come to, unaided and unassisted by the slightest intimation or suggestion by the trial judge; and the measure of the trial judge's discretion in asking for information from the jury in order to enable him to determine the likelihood of an agreement and the proper exercise of discretion in the declaration of a mistrial should be limited to the general inquiry: Is there an agreement, or is there likely to be an agreement? Beyond this formal and general communication between the judge and the jury relating to an agreement "evil cometh." Especially is this true in this State, where, under the mandatory terms of the "dumb act" (Civil Code of 1910, § 4863), a trial judge is forbidden to express or intimate any opinion as to the facts of the case. The spirit of this act contemplates that during the progress of the trial, and until the verdict is finally received, the trial judge shall say nothing indicating any opinion as to which side should prevail, and do nothing that could in any manner unduly press the jury to agree upon a verdict. What we here contend for can not be regarded in the light of a mere technicality. It is a right vital to the value of jury trial, imbedded in the jurisprudence of this State, and secured by the mandatory terms of the statute. The Supreme Court has on several occasions had before it cases involving the question here discussed. A consideration of some of these cases will demonstrate how zealously that court has guarded the right of a unanimous verdict, which should be reached by the jury, uninfluenced by any expression by the trial judge, either of a coercive or a persuasive character. In *Alabama Great Southern Railroad Co. v. Daffron*, 136 Ga. 555 (71 S. E. 799), the following language is used: "The court should not unduly press a jury to agree upon a verdict; and in the use of any remarks designed to impress the desirability of reaching a verdict, he should be careful to refrain from any expression of a coercive nature or which possibly may mislead them into an erroneous method of reaching a verdict." In that case the language ob-

jected to was as follows: "Gentlemen of the jury, have you agreed upon the question as to the right to recover? Juror: We have, but differ as to the amount. Court: It does look like you might agree upon that; you ought to agree upon the amount. I might be going a little too far, but verdicts are mostly all compromises. No man gets all he wants in things of that kind; and having agreed upon the essential point, the question of whether or not there should be a recovery, it does look like you all might get together on some amount,—that is, you might make a conjunction, as defined by an old rural schoolteacher, who, when asked what a conjunction was, said, 'A conjunction is the coming together of two or more persons or things, as John and James met.' You may retire and see if you can come together." The Supreme Court held that this language was improper and was prejudicial to the defendant; that "its tendency was to suggest that the jury might arbitrarily compromise, divide, and yield for the mere sake of agreement." In the course of the opinion the learned Justice speaking for the court quotes with approval the language of the Supreme Court of Michigan, in *Goodsell v. Seeley*, 46 Mich. 623 (41 Am. R. 183, 10 N. W. 44). In that case, in response to an inquiry by the judge, the jury said that they "had not agreed, but stood eleven to one, and divided on \$200." The judge in reply told them, "if that is the only difference, it would be better for the county and the parties on both sides that one or both sides yield so as to come together. It would be unfortunate for all to have a disagreement when the difference is so small," and he asked them to get together if possible. A new trial was granted upon this ground, and in the opinion Judge Cooley said: "It is no doubt true that juries often compromise in the way here suggested, and that by 'splitting the difference' they sometimes return verdicts with which the judgment of no one of them is satisfied. But it is an abuse. The law contemplates that they shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide, and yield for the mere purpose of an agreement. The sentiment or notion which permits this tends to bring the jury trial into discredit and to convert it into a lottery. It was no doubt very desirable to the public and to the parties that the jurors should agree if they could do so without sacrificing what any one of them believed were the just rights of the parties; but not otherwise." In *Georgia Railroad v.*

Cole, 77 Ga. 77, a suit to recover damages on account of personal injuries, which was closely contested on the facts, the judge, after the jury had been charged and had retired, had them brought back into the court-room, and asked them if they were likely to agree upon a verdict. One of the jurors replied that they were not. The court thereupon inquired whether the trouble was upon a point of law or fact, and the juror responded that it was upon a question of amount, and the judge said: "I can not aid you in that, as I know of, in any way, further than to say that, upon that matter, the jury ought to make a very earnest effort to agree . . . upon the amount. Of course, a juror ought not to give up his convictions, if they are so strong, but there ought to be an effort to come to an agreement. You can retire and see if you can not agree upon the amount." It was held that this was error, and a new trial was granted. "The jury might have understood the court as favoring a finding for the plaintiffs; and his remarks might have induced some of them to give up opinions which they may have entertained in favor of the defendant." This was a unanimous decision, but one of the Justices concurred dubitante. It is apparent, from the opinion of the court, that a new trial would not have been granted if the case had not been a close one on the facts, in which a verdict for either party would have been authorized.

In *Parker v. Georgia Pacific Railway Co.*, 83 Ga. 540 (10 S. E. 233), Mr. Chief Justice Bleckley, speaking for the court, held that while the following language did not unduly press the jury to a verdict, "it went, perhaps, to the allowable limit:" "This jury is, in the eye of the law, as capable of deciding this case and reaching a verdict as any that may be empanelled hereafter, and I am disposed to give you some further opportunity to consider your verdict. Go to your room and make an honest effort to agree on a verdict, and follow the rule I have given you, and I do not think it will trouble you in agreeing." The rule which the trial judge referred to was that they should reconcile the testimony of conflicting witnesses if they could, without imputing perjury to any of them, and that they should find a verdict according to the preponderance of the evidence.

In *White v. Fulton*, 68 Ga. 513, the trial judge used substantially the language above quoted, saying that if the jury would follow the rule as to the preponderance of the testimony, and would

endeavor to reconcile the testimony of witnesses, there would never be a necessity for mistrials, and that there had been no mistrial in his circuit for three years. The court held that this was no invasion of the province of the jury, but disapproved the remarks on the subject of mistrials, and used the following language: "Under our view the court should abstain from making any remarks to a jury that would bear even the semblance of coercion to secure a result. Juries should be left free to act without any real or seeming coercion on the part of the court, and the verdict should, as to the facts, be the result of their own free and voluntary action."

In *Golatt v. State*, 130 Ga. 18 (60 S. E. 107), after the jury had been deliberating for some time, the judge had them brought into the court-room and asked them if they had agreed on a verdict, and, upon being answered in the negative, stated to them that it was their duty to agree in the case; that it had been fairly submitted to their consideration; that no juror should "stick out" in a spirit of stubbornness; that it was no credit to a juror to do that; but that if any juror had honest, abiding convictions which he found it impossible to reconcile, after due consultation with the other jurors, "let him stand by them;" and that it was the duty of the jurors to confer together and make an honest effort to agree. Although a majority of the Supreme Court held that the judge's language in that case was not error requiring a new trial, they held that it went "near or quite to the limit of what is permissible," and they indicated that they would have held otherwise if the case had been one of conflicting evidence or closely contested issues of fact, or of circumstantial evidence, or if there had been any error in the charge or rulings of the court on other subjects; and they affirmed the judgment because the case was "one of shocking murder, with no conflict in the evidence, and no apparent ground for palliation." Justices Atkinson and Holden, however, held that this language was improper and was reversible error, and that it "was of such a character as to mislead the jury as to their duty and press them too hard toward the finding of a verdict."

In the case of *Ball v. State*, 9 Ga. App. 162 (70 S. E. 888), this court held that the principle that a verdict must be the unanimous conviction of all the jurors was imbedded in the jurisprudence of this State, and this unanimity must be the voluntary conclusion of the jurors, uninfluenced by any instruction or suggestion from the

judge that might induce one juror to surrender his individual conviction of the truth and to accept the opinion of the other jurors. A majority of the court held that it was of doubtful propriety for the trial judge ever to inquire how the jury stands numerically, and that it was presumptively hurtful to the defendant for the judge, on information that the jury stood eleven to one, even remotely to suggest to the one juror that he ought to surrender his convictions to those of the majority. The language used by the trial judge to the jury in the *Ball* case was that "usually where the jury stands eleven to one, the one juror comes to the eleven, but, of course, you must be guided by your own consciences, as the one might be right and the eleven wrong." In that case the majority of the court, entertaining the view that the evidence was doubtful as to the identity of the accused as being the guilty party, reversed the judgment refusing a new trial, because of the language used by the judge to the jury, stating, however, that they would not do so for this error if the evidence had demanded the verdict.

We apprehend that there can be little doubt of the soundness of the general rule stated in the foregoing opinions. Doubt arises only on the application of the rule to the particular facts. In the light of the general rule and of analogous cases decided by our Supreme Court herein cited, and in view of the fact that the evidence in this case was almost equally balanced between the plaintiff and the defendant and that a verdict would have been authorized for either party, we are constrained to grant another trial, because of the presumptively harmful character of the language used by the judge to the jury. The defendant in error relies upon the case of *Winn v. Ingram*, 2 Ga. App. 757 (59 S. E. 7). An examination of the language used by the trial judge in that case does not disclose any material variance from that used by the trial judge in the present case. In so far, however, as the opinion in that case is in conflict with the views here expressed, it is overruled.

Judgment reversed.

3679. WALLACE *v.* METROPOLITAN LIFE INSURANCE
COMPANY.

1. A custom on the part of a life-insurance company, under which its policy-holders are allowed thirty days after the maturity of the premiums within which to pay them, does not require the company to accept a premium after the expiration of such period.
2. Where, under the terms of a policy of life insurance, premiums are made payable at the home office of the insurance company, it may, upon notice to a policy-holder, discontinue a custom of sending an agent to the place of business of the insured to collect the premiums.
3. The facts of this case are held insufficient to have authorized a finding that the forfeiture of the plaintiff's policy on account of non-payment of premium was waived by the insurer.

DECIDED FEBRUARY 12, 1912.

Action for damages; from city court of Atlanta—Judge Reid.
May 5, 1911.

John A. Boykin, Dorsey & Shelton, for plaintiff.

Smith, Hammond & Smith, A. W. Smith Jr., for defendants.

POTTLE, J. Wallace brought suit against the Metropolitan Life Insurance Company to recover the sum of \$167.82, which the plaintiff had paid to the company in premiums on a certain life-insurance policy, and which he alleged he was entitled to recover on account of the wrongful and illegal cancellation of his policy by the defendant company. At the conclusion of the evidence the trial judge directed a verdict in favor of the defendant, and this is the error assigned.

1, 2. The policy of insurance was issued on March 31, 1904, and provided for the payment of annual premiums of \$40 on March 31 of each year, beginning with the date of the issuance of the policy. One of the conditions of the policy was that "premiums are payable at the home office in the city of New York, but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipts, signed by the secretary and countersigned by the persons receiving the payments." Some time after the issuance of the policy, the plaintiff was allowed to change the manner of payment of his premiums to quarterly instalments of \$10.64 each. It appears from the evidence that up to the fall of 1907 the plaintiff was an employee of the defendant company at its branch office in Atlanta, and that he paid his premiums at the office where he

was employed. In the fall of 1907 he left the service of the company, and from that time until March, 1908, he paid two quarterly premiums to a collector of the company, who called at the plaintiff's office in the Candler building for this purpose. It was a custom of the company in Atlanta to send out agents to collect the premiums due from its policy-holders, and these agents would call either at the residence or the business office of the policy-holder, as the latter might prefer. It was also a custom of the company to allow a period of thirty days after the premium became due under the terms of the policy, within which the premium might be paid. A quarterly premium was due by the plaintiff on March 31, 1908, and under this custom could have been paid at any time up to and including April 30, 1908. This premium was not paid within the grace period, but on May 1, 1908, the plaintiff wrote a letter to the president of the company, addressed to its home office in New York, enclosing a draft for the quarterly premium and also the amount of a premium due by his wife, and asking that the same be accepted. In this letter the plaintiff stated that on April 30 a young lady stenographer at the office of the company in Atlanta called him up on the telephone and notified him that his premium was due. In this letter also the plaintiff complains at great length of the conduct of certain officers of the company in Atlanta, and of his discharge from the service of the company in 1907, and that the company's collector failed to call upon him to collect the quarterly premium which he enclosed in the letter. On May 14, 1908, one of the vice-presidents of the company in New York wrote to the company's superintendent in Atlanta, enclosing the plaintiff's draft, and suggesting to the superintendent that there was no reason why a representative of the company might not call at the plaintiff's office to collect his premiums. The superintendent was advised by the vice-president, "You can do as you please about making any arrangement such as he desires." The letter further stated: "We are willing to accept the premiums, notwithstanding the grace period has expired under both policies, and although Wallace tells us in his letter that his wife is an uninsurable risk; but if you decide that it will not be convenient to have calls made at his office for collection of these premiums at the time he elects, he should be plainly told that this is the last time we will accept premiums not tendered within the grace period." The last paragraph of this

letter was as follows: "We omitted to tell you that Wallace deducted from his remittance ten cents to cover the cost of draft and four cents to cover postage. He, of course, had no right to do this, but we would rather allow it to him than to have a squabble, if you decide that it is best for the company to accept the premiums and reinstate the business." On May 19, Wright, the superintendent, wrote to the plaintiff that if he would come to the office, he would assist him in straightening out "these matters which have been referred to me." On May 26, no reply to the last letter having been received from the plaintiff, the superintendent again wrote that unless plaintiff would come to the office within the next day or two, the papers would be returned to the New York office and he could settle with the officials there. On June 1 the plaintiff wrote to the superintendent, stating that he could be found at his office in the afternoon between certain hours, and that if the superintendent would call on the plaintiff at his office, the plaintiff would take the matter up with him. On June 9, 1908, the plaintiff's draft was returned to him by the New York office. On the lapsed-policy register for the week commencing June 14, 1908, a notation was made that the plaintiff's policy had been canceled.

Upon these facts the plaintiff insists that the judge erred in directing a verdict in favor of the defendant. In our opinion, the trial judge was clearly right in his construction of the evidence. The plaintiff relied upon a course of dealing varying the express terms of his contract, and also upon a waiver by the defendant company of the forfeiture of his policy after it had taken place on account of the non-payment of his premium. In the first place, there was no course of dealing shown under which policy-holders had been permitted to pay their premiums after the expiration of thirty days of grace allowed. It does appear that there was a custom of the company allowing this thirty-days grace, and also that the company sent out agents for the purpose of collecting the premiums, but there is no suggestion in the evidence that the company had any custom, or that it had, by any previous course of dealing, led the plaintiff to believe that he could pay his premium after the expiration of the thirty-days period. But even if such a custom existed, the company had a right to discontinue it upon notice to a policy-holder who had theretofore been receiving the benefit of such a custom. It distinctly appears from the letter of

the plaintiff to the president of the company that on April 30, the last day upon which the premium could have been paid, one of the employees of the defendant company called the plaintiff up over the telephone and reminded him that his premium was due. The plaintiff testified that he had talked with the stenographer at the Atlanta office, but could not remember whether it was in April or when, but the fair inference, from all of his testimony, is that his conversation with the stenographer is the one referred to in his letter. This conversation with an employee of the company over the telephone was sufficient to have put the plaintiff on notice that his premium receipt was at the office of the company, ready to be delivered to him upon payment of his premium, and was in effect notice to the plaintiff that the company expected him to call at the office and pay his premium. We think that there is nothing in the evidence which would have authorized the jury to find that there was a custom or course of dealing on the part of the defendant company which authorized the plaintiff to withhold his premium beyond the thirty-days period which had theretofore been allowed to him purely as a matter of grace.

3. Nor was there anything in the evidence which would have authorized the jury to find that the company had waived the forfeiture which took place at midnight on April 30 by reason of the plaintiff's failure to pay his premium before that time. It is earnestly insisted by counsel for the plaintiff in error that the letter of the vice-president to the superintendent at the Atlanta office had this effect, but we do not think this is a fair construction of that letter. The substance of the letter was that while the writer representing the company was perfectly willing to accept the premium and reinstate the plaintiff's policy, yet, at the same time, this was a matter under the direct jurisdiction of the Atlanta office, and it was left to the local superintendent to decide whether it was for the best interests of the company to accept the premium and reinstate the policy. It is true that the letters from the superintendent to the plaintiff indicate that in all probability, if the plaintiff had called at the office of the company in Atlanta, as he was invited to do, the superintendent would have adjusted the matter satisfactorily to the plaintiff. But in none of these letters was there any agreement to do this, and, besides, it appears that the plaintiff did not accept the invitation and call at the office to arrange the

matter as he was requested to do. Some stress is laid by counsel upon the fact that the company failed to note any cancellation of the policy on its register until the week beginning June 15, 1908, and counsel argue from this that the forfeiture of the plaintiff's policy was in abeyance until that time. But we can not agree to this proposition. The forfeiture took place, under the terms of the policy, as modified by the custom about which plaintiff testified, at midnight on April 30, 1908. In order to reinstate the policy, some affirmative act upon the part of the officials of the company, amounting to a waiver of the forfeiture, was necessary. Mere omission to record it upon the lapsed register until June 15, or after, could not in any way affect this question.

Retention by the company of the plaintiff's draft, under the circumstances, would not amount to a waiver. A draft is not payment until it is paid. The company did not collect the draft, and ultimately returned it to the plaintiff, who accepted it. In addition to this, the evidence shows that all during the time the company held this draft its officials were making an effort to arrange matters to the satisfaction of the plaintiff. The failure to have his policy reinstated was not due to any lack of diligence or fair dealing on the part of the officials of the defendant company, but was directly due to the plaintiff's own conduct in failing to respond to a very reasonable request on the part of the company's officials, that he meet them at their office for the purpose of discussing the matter. There was no error in directing a verdict in favor of the defendant.

Judgment affirmed.

RUSSELL, J., dissenting. I do not think the evidence with reference to the waiver or non-waiver of the forfeiture on the part of the insurance company is so clear as to have demanded the verdict directed by the court. It is perfectly plain to my mind that the insurer had the right to insist upon the forfeiture at midnight of April 30, but it requires an absolutely plain case to authorize the court to do more than to define to a jury the meaning of the word "waiver." The proof of waiver is derived from evidence of intention, as developed by the acts and declarations of the parties concerned, and is a question of fact to be determined by a jury. In my opinion the evidence would have authorized a jury to reach a different conclusion, upon the issue as to whether there was a waiver of the forfeiture, from that implied by the direction of the verdict.

Especially is this true when it is the duty of the courts to be "prompt to seize hold of any circumstance that indicates an election to waive a forfeiture, or an agreement to do so." *Insurance Company v. Eggleston*, 96 U. S. 577 (24 L. ed. 841); *Knickerbocker Insurance Co. v. Norton*, 96 U. S. 234 (24 L. ed. 689).

3680. *SARTORIOUS v. PAPER MILLS COMPANY.*

- HILL, C. J. 1. Where the process attached to the petition was dated January 7, 1907, and required the defendant to be and appear at the city court of Atlanta to be held on the first Monday in January, 1908, and the defendant was duly served with the petition and process, and appeared in that court at the January term, 1908, and filed a plea to the merits of the suit, this was a waiver of irregularities in the proceedings, and it was not error to overrule a motion to dismiss the petition, made one year after the plea was filed, because of the mistake in the date of the process. Civil Code (1910), § 5551. The date of the process was immaterial when the defendant was duly served with the petition and process and made an appearance and filed a plea at the term of the court at which the process required him "to be and appear."
2. The copy of the note sued on, attached to the petition, contained the clause that it was payable "at the 4th National Bank of Atlanta, Ga., for value received, with interest after date until paid, at 8 % per annum." By an amendment to the petition this clause was stricken, and in lieu thereof the following inserted: "At the 3rd National Bank of Atlanta, Ga., for value received, with interest at 6 % per annum," etc. *Held*: (1) The amendment was properly allowed. *Chapman v. Skellie*, 65 Ga. 125 (1). (2) Overruling a motion to continue on the ground of surprise because of the allowance of the amendment was not an abuse of discretion, in the absence of a showing that the movant was less prepared to go to trial. *Ga., Fla. & Ala. Ry. Co. v. Sasser*, 4 Ga. App. 276 (2), (61 S. E. 505).
3. The evidence demanded the verdict directed, and the bill of exceptions is so clearly without merit that the judgment is affirmed, with 10 per cent. on the amount of the judgment as damages for delay in suing out and prosecuting the writ of error.

Judgment affirmed, with damages.

DECIDED FEBRUARY 12, 1912.

Complaint; from city court of Atlanta—Judge Calhoun. May 30, 1911.

Morris Macks, for plaintiff in error.

J. E. & L. F. McClelland, contra.

3684. SOUTHERN RAILWAY CO. v. CARTLEDGE.

1. Where a railway company fails to stop its train and permit a passenger to alight at a flag station to which the company has sold him a ticket, he has a right of action for the recovery of such damages as are legally traceable to the wrongful act.
2. Where, however, the act of the carrier is a mere negligent omission of duty, and the passenger's injury consists wholly of the inconvenience occasioned by having to walk a short distance back to the station, the carrier is liable for nominal damages only.
3. In the trial of a suit by a passenger, where, under the rule laid down in the preceding headnote, nominal damages only are recoverable, and there are no aggravating circumstances connected with the mere negligent omission of duty, it is error to instruct the jury that punitive damages may be recovered.
4. In such a case it is also error to charge the provisions of the Civil Code (1910), § 4504, in reference to vindictive damages; especially that portion of the section which provides: "The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed."
5. Where in the trial of such a case the carrier admits the negligence alleged, the provisions of the Civil Code (1910), § 2780, relating to the presumption of negligence against a carrier, have no application.
6. Damages traceable to the wrongful act, but not its legal or natural consequence, are too remote and contingent to be the basis of a recovery. Applying this rule to the facts of the present case, the plaintiff was not entitled to recover damages alleged to have resulted from an illness caused by a rain which suddenly descended upon him.

DECIDED FEBRUARY 12, 1912.

Action for damages; from city court of Elberton—Judge Meadow presiding. July 17, 1911.

The plaintiff bought a ticket from Cannon, in Franklin county, to Hardcash in Elbert county; a flag station on the line of the defendant's railway. The conductor carried him beyond his station. Upon observing that the train was not slowing down at the flag station, the plaintiff immediately went to the conductor and called his attention to the fact that he was being carried beyond his station. Thereupon the conductor proposed to carry him on to Dewy Rose, a station about two miles farther on, or to stop at the place where the train then was and permit him to disembark. He accepted the latter proposition and got off the train about a mile beyond Hardcash. The night was dark and cloudy. He was on his way to see his grandmother, who was seriously ill. She lived about two miles from Hardcash and about a mile and a quarter from the place where he got off the train. He walked back to Hardcash, a

distance of about a mile, and then walked from Hardcash to his grandmother's home, arriving there late at night. While on his way from Hardcash to his grandmother's, a sudden rain came up, and he walked along for some time in the rain without seeking shelter at any of the near-by residences. As a result of the wetting which he thus received, he alleged that he was made sick, suffered pain, and lost several weeks from his business.

At the trial the defendant admitted liability for nominal damages. The plaintiff insisted that there were aggravating circumstances connected with the tort, growing out of the conduct of the conductor at the time the train was stopped and the plaintiff disembarked. He testified, "The conductor ordered me to get off. He said that I would have to get off or he would take me on. When I told him that I did not have any business at Dewy Rose he told me to get off. He spoke to me in a rather loud tone of voice. You know the train was making a lot of noise, and we had to talk loud. When I approached the conductor on the train he talked pretty glum and tolerably loud. He talked pretty harsh to me and said if I wasn't going to get off, he would carry me to Dewy Rose or he would put me off right there." The jury returned a verdict in favor of the plaintiff, for \$200, and the defendant's motion for a new trial was overruled.

Thomas J. Brown, A. G. & Julian McCurry, for plaintiff in error.
Worley & Nall, contra.

POTTLE, J. The defendant, having carried the plaintiff beyond the point of his destination, was liable to him in damages. But as the evidence showed a mere negligent omission, unaccompanied by any aggravating circumstances, punitive damages were not recoverable. The conduct of the conductor as set forth in the statement of facts was not such as to authorize the jury to find this character of damages against the defendant. *Ga. R. Co. v. Benton*, 117 Ga. 785 (45 S. E. 70). In the case just cited the plaintiff testified that the conductor spoke to him roughly, telling him that he would have to get off or pay more money immediately. The trial judge instructed the jury that they might find punitive damages, and the Supreme Court set aside a verdict of \$150, on account of this error in the charge, and because the court charged the law now in the Civil Code (1910), § 4504. See also *Sappington v. A. & W. P. R. Co.*, 127 Ga. 178 (56 S. E. 311). The case differs from

those where a passenger is unlawfully expelled from a train under circumstances of more or less aggravation. In such cases punitive damages are recoverable. *Savannah El. Co. v. Badenhop*, 6 Ga. App. 371 (65 S. E. 50). The case was one for nominal damages only.

It is true the plaintiff claimed that he had been made sick on account of having been caught in the rain while on his way from Hardcash to his grandmother's, but any such damages sustained by him were not the legal and natural consequence of the act of the defendant in carrying him beyond his station. Indeed, it appears from the evidence that he unnecessarily walked back to Hardcash and from thence to his grandmother's home, when he could have gotten there by a much shorter route. The company was under the duty of putting the plaintiff off at Hardcash; it had assumed no obligation to take him to his grandmother's residence, two miles in the country, and any injury which he sustained resulting from the fact that he voluntarily walked from Hardcash to his grandmother's home would be entirely too remote to be the basis of a recovery. See Civil Code (1910), § 4510; *Sappington v. A. & W. P. R. Co.*, supra; *Central R. Co. v. Dorsey*, 116 Ga. 719 (42 S. E. 1024). The case differs from that of *Georgia Ry. & El. Co. v. McAllister*, 126 Ga. 447 (54 S. E. 957, 7 L. R. A. (N. S.) 1177), for in that case the plaintiff was put off in a rain-storm, and, therefore, any injury which she received was the direct consequence of the illegal act.

It was clearly error for the trial judge to charge the jury the provisions of section 4504 of the Civil Code (1910), and especially that portion of the section which provides that "the worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed." It has been expressly held by the Supreme Court that the provisions of this section of the code have no application in a case like the present. *Ga. R. Co. v. Benton*, supra.

The case was tried upon an erroneous theory. The only question which should have been submitted to the jury was as to what amount they should find for the plaintiff as nominal damages for the defendant's negligent act in failing to stop its train at the station. The defendant admitted the technical breach of duty and its consequent liability for nominal damages. There was, therefore,

no issue in the case as to the defendant's negligence. For this reason, the provisions of the Civil Code (1910), § 2780, relating to the presumption of negligence against the carrier where a person is injured by the running of cars, trains, or other machinery, were wholly inapplicable. *Ga. Ry. & El. Co. v. McAllister*, 126 Ga. 447 (54 S. E. 957, 7 L. R. A. (N. S.) 1177). Indeed, it is difficult to see how the provisions of this section of the code could be applicable in any case where the sole claim of negligence is that the plaintiff was carried beyond his station. Under some circumstances, a verdict of \$200 might be considered as for a nominal amount, but it can not be said in this case, as matter of law, that the jury intended to find only a nominal verdict. The case having been submitted to them on the theory that they might find punitive damages, and might find damages on account of illness which the plaintiff claimed to have suffered, it is very probably true that the jury intended the verdict of \$200 to be compensation for these damages which the plaintiff claimed to have sustained. At any rate this court can not say that this is not true, and the case must be sent back for another trial, in the light of the views expressed in this opinion.

Judgment reversed.

RUSSELL, J., concurring specially. I concur in the decision in this case solely for the reason it is probable that the jury were influenced by the instructions of the court to which reference has been made by Judge Pottle. We are all agreed that the plaintiff's right to recover nominal damages is undoubted. If the jury had seen proper to return \$200 as merely nominal damages, I should be in favor of affirming the judgment refusing a new trial.

While I do not personally assent to the doctrine of some of the rulings cited by my brother Pottle, I am judicially bound by them. In my opinion it should be left to the jury in this case to say whether there were any such circumstances of aggravation in the manner of the conductor as would have entitled the plaintiff to recover punitive damages, under the ruling in *Savannah Electric Co. v. Badenhop*, 6 Ga. App. 371 (65 S. E. 50), and cases therein cited. However, I am compelled to concur in the judgment of reversal, because the case was submitted to the jury on the theory that they might find punitive damages, as well as damages on account of illness, which are clearly too remote for recovery. As it can not be said with certainty that these errors did not contribute

to the amount of the verdict, the error must be presumed to have been injurious to the defendant in the court below, and another trial should have been granted.

3262. DISTRICT GRAND LODGE NO. 18 v. SHELTON.

POWELL, J. This case is controlled by *Starnes v. Atlanta Police Relief Asso.*, 2 Ga. App. 237 (1, 2, 3), (58 S. E. 481).

Judgment affirmed.

DECIDED JANUARY 15, 1912. REHEARING DENIED FEBRUARY 12, 1912.

Appeal; from Fulton superior court—Judge Bell. February 4, 1911.

Suit was brought in a justice's court against District Grand Lodge No. 18, G. U. O. O. F. of Georgia, for the amount of a policy issued to the plaintiff's husband, John C. Shelton, by which, in consideration of his agreement, on becoming a member of West End Lodge No. 7687 of the G. U. O. O. F., to comply with the laws of the said order, especially those set out on the reverse side of the policy, the Bureau of Endowment of the order agreed to pay her, as beneficiary, \$100, within 90 days after satisfactory proof of his death "while in good standing in said Bureau of Endowment." The defendant contended that Shelton was not in good standing in his lodge and in the Bureau of Endowment at the time of his death; that at that time he owed three months' dues, and had been suspended. On appeal, the plaintiff obtained a verdict in the superior court for the amount of the policy. The defendant's motion for a new trial was overruled, and it excepted.

The provisions referred to in the policy, as set out on the reverse side, are as follows: "Each and every member indebted to the Bureau of Endowment for two months' dues is hereby suspended from the benefits of said bureau, and in case of a member's death while dues for two months or more are unpaid, the beneficiary of such deceased shall in no event be entitled to recover any benefits whatsoever from said bureau." "The Bureau of Endowment shall in no event be responsible to individual members for neglect or failure of the lodges to send in to the District Grand Secretary the names or name of its members under the requirement of this act, but will protect said members in their benefits aforesaid when

prompt application is made by him to the Bureau of Endowment." "It is expressly understood and declared that the lodge is the agent of the member or insured, and not of the Bureau of Endowment."

From the proof of death furnished to the defendant, it appeared that Shelton died on January 27, 1910. The District Grand Secretary of the defendant testified, that he kept the life register of the Bureau of Endowment, that it showed the classification of each member, and that Shelton did not pay his dues to the Bureau of Endowment for the months of October, November, and December, 1909. This register was introduced in evidence. It contained an entry in reference to Shelton as follows: "Suspended 12-1-09." Laws of the District Grand Lodge, which were introduced in evidence, provided that it should be the duty of the Permanent Secretary to forward to the Secretary of the Bureau of Endowment on or before the 10th of each month his report for the month, with 25 cents for each member last reported; that the Secretary of Endowment should collect all funds of the bureau; also: "The District Grand Secretary shall keep a life register of each and every member of the Bureau of Endowment, whereon he shall note the forfeiture, suspension, or expulsion of each and every member as the same may occur, together with the date of every policy, such notation to be made each and every month from the reports of the several lodges of the jurisdiction. No beneficiary shall receive or recover any of the benefits provided, unless the classification of the deceased member in the office of the Secretary of Endowment is that of a Financial Odd Fellow, as determined by the rules and regulations of the Bureau of Endowment, all of which rules and regulations are expressly made a part of each contract and policy." R. H. Echols testified, that during October, November, and December, 1909, he was Permanent Secretary of the lodge mentioned in the policy, of which John C. Shelton was a member, and that Shelton did not pay his dues for these months.

The plaintiff introduced in evidence a "financial card," with entries showing the amounts of Shelton's dues for October, November, and December, 1909, preceded by the following statement: "Brother John Shelton in account with West End Lodge No. 7687, G. U. O. O. F. Permanent Secretary's address, Sidney R. Gray," etc. Opposite the entry of October dues, and under the heading "P. S. Signature," was the signature, "S. R. Gray," and

opposite the entries of November and December dues and under the same heading, was the signature "G. W. Spann." G. W. Spann testified that this was his signature; that the letters "P. S." meant "Permanent Secretary;" that he was not Permanent Secretary, but was Elective Secretary of the lodge mentioned, and had no authority to receive and receipt for dues of members; that this was the duty of the Permanent Secretary.

In the motion for a new trial it is alleged, that the verdict was without evidence to support it, and that the court erred in not excluding from evidence the "financial card," upon the objection that it appeared from the evidence that Spann was not Permanent Secretary of the lodge, and that he had no authority to receive and receipt for dues.

C. P. Goree, for plaintiff in error. *C. B. Rosser Jr.*, contra.

3686. CHRISTIE v. SHINGLER.

- HILL, C. J. 1. The execution of a written transfer of a promissory note by a corporation as the payee, denied on oath, is proved by the undisputed evidence of the president of the corporation that he, as president and duly authorized agent of the corporation, executed the written transfer of the note, for and in the name of the corporation. In such case the testimony of a subscribing witness to the written transfer was not necessary to prove its execution. Civil Code (1910), § 5833 (5).
2. A written transfer of a note by a corporation as the payee named therein is sufficient to pass title to the transferee, although the corporate seal is not affixed to the transfer. In this case, however, the record is silent as to whether the written transfer had or had not the seal of the corporation attached. The note, with written transfer, was properly admitted in evidence. *Almand v. Equitable Mortgage Co.*, 113 Ga. 984 (39 S. E. 421).
3. No defense whatever was made to the suit on the merits, and the special assignments of error, dealt with in the foregoing rulings, are so manifestly frivolous that the judgment of the lower court is affirmed, with 10 per cent. on the amount of the judgment, as damages for delay in suing out and prosecuting the writ of error.

Judgment affirmed, with damages.

DECIDED FEBRUARY 12, 1912.

Complaint; from city court of Miller county—Judge Bush. June 14, 1911.

W. I. Geer, for plaintiff in error.

E. M. Donalson, contra.

3700. WHITE *et al.* v. BROWN, Governor, *et al.*

Where process is prayed against a named person, and there is nothing in the petition to indicate an intention on the part of the plaintiff to name any other person as defendant, the suit must be construed as having been brought only against the party named in the prayer. In such a case, the clerk has no authority to annex a process directed to a different person, nor can the petition be amended by striking the name of the defendant from the prayer and substituting in his stead that of the person named in the process.

DECIDED FEBRUARY 12, 1912.

Motion to set aside judgment; from city court of Blakely—
Judge Rambo. August 23, 1911.

Byron R. Collins, for plaintiffs in error.

Glessner & Park, contra.

POTTLE, J. A judgment absolute upon the forfeiture of a criminal recognizance was entered in the city court of Blakely against White as principal and Harris as surety. At a subsequent term they filed a petition seeking to set aside the judgment absolute, upon several grounds mentioned in the petition. The petition did not in its body name any person as a party defendant, but did allege that the judgment sought to be vacated was against the plaintiffs and in favor of J. M. Brown, Governor. The plaintiffs prayed that process issue against the solicitor of the city court. The clerk annexed a process naming Hoke Smith, Governor, as defendant, and requiring him to appear and plead, and service was acknowledged by the solicitor, but no waiver of process was made. At the trial term the city-court solicitor entered a special appearance in behalf of "J. M. Brown and his successor, Hoke Smith, Governor," and moved the court to quash the process which had been issued by the clerk, requiring the Governor to appear and answer the petition. Thereupon the plaintiffs offered an amendment praying that process issue, directed to Hoke Smith, Governor, and striking the prayer for process against the city-court solicitor. The court refused to allow the amendment, and dismissed the petition; to all of which the plaintiffs excepted.

This was not an effort to amend a defective process. The process was in proper form. It is clear, however, that the city-court solicitor was the party defendant, since this must be determined by the prayer for process. In the body of the petition no other person was named as defendant, nor was anything therein

disclosed to indicate an intention to proceed against any other person as defendant. *Orr Shoa Co. v. Kimbrough*, 99 Ga. 143 (25 S. E. 204). The clerk was without authority to annex a process calling upon Governor Smith to appear and answer, and such a process was properly treated as a nullity. *Seisel v. Wells*, 99 Ga. 159 (25 S. E. 266). The amendment offered sought to add a new and distinct party, and was properly disallowed. The mere acknowledgment of service by the solicitor did not cure the defect. *Seisel v. Wells*, supra. The decision in *Lyons v. Planters Bank*, 86 Ga. 485 (12 S. E. 882, 12 L. R. A. 155), does not, upon its facts, conflict with what is now ruled. In that case there was no prayer for process at all, and the persons named as defendants appeared and pleaded. This was a waiver of process and of a prayer therefor. It has never been held that a plaintiff can proceed directly against one person as defendant, and then, by amendment, convert the action into one against an entirely different person.

Judgment affirmed.

3704. SOUTHERN RAILWAY CO. *et al.* v. PARHAM.

1. It is not, as a matter of law, negligence to leave a moving train, unless it clearly appears that the danger in attempting to do so is obvious to a person of common prudence and ordinary intelligence; and whether the attempt to get off, or the alighting from a moving train is negligence is generally a question of fact for the jury.
2. One who goes upon a train for the purpose of assisting a lady and her young children who intend to become passengers thereon is in no sense a trespasser, but is a licensee, and when his presence thereon and his purpose to get off become known to the employees of the railroad company in charge of the train, he is entitled to the duty of ordinary diligence on their part.
3. A witness who testifies as a medical expert can not be impeached by showing that in other cases he had made mistakes in his diagnosis. Testimony as to his general reputation, and not as to his success or failure in special cases, is admissible for the purpose of impeachment.
4. The trial judge should only charge principles of law applicable to the issues made by the pleadings and evidence; but where the judge charged a correct abstract principle of law not required by the pleadings, but injected into the case by the defendant, on which evidence had been introduced by both sides without objection, and in this connection distinctly instructed the jury that the plaintiff could only recover on the allegations of the petition, the error was immaterial and harmless.
5. In a suit brought against a railroad company to recover damages for

personal injuries caused by the running of its "locomotive or cars," where an employee was joined as codefendant, it was not erroneous for the trial judge to charge the jury on the statutory presumption against the railroad company, and to fail to charge that such a presumption did not arise against the individual codefendant, in the absence of a specific timely request to do so.

6. As a general rule no exact method of measuring damages is laid down. In cases of permanent injuries, the jury may, but are not compelled, to adopt and use the mortality tables as a basis of calculation. The jury should give such compensation by their verdict as would be just and reasonable to both parties, and, in arriving at this standard, may consider the evidence on the subject, in the light of experience and common sense.
7. Trial courts have not only the right, but it is their duty, to correct any erroneous instructions, and court and counsel should co-operate to prevent injustice through erroneous instructions. It can not be erroneous for the court, after having charged the jury, to call attention to certain parts of the charge as incorrect, and to withdraw those parts from their consideration.
8. Testimony as to involuntary exclamations manifesting the existence of pain is admissible. Such exclamations are symptomatic, a part of the *res gestæ*, and not self-serving declarations, and the evidence relied upon to prove them is not hearsay.
9. No material error of law appears, and the evidence supports the verdict.

DECIDED FEBRUARY 12, 1912.

Action for damages; from Elbert superior court—Judge Meadow. July 29, 1911.

A. G. & Julian McCurry, Thomas J. Brown, for plaintiffs in error.

Smith, Hastings & Ransom, contra.

HILL, C. J. Parham sued the Southern Railway Company for injuries sustained by him on alighting from a train, joining as codefendant the conductor of the train, and recovered a verdict for \$3,750. The defendants' motion for a new trial was overruled, and the case is here for review. The evidence in behalf of the plaintiff is, in substance, as follows: On the date alleged in the petition the plaintiff went to the depot of the railway company at Dewy Rose, a station in Elbert county, for the purpose of assisting a lady and her two little children, who intended to take passage on the train. It was night, and one of the children was asleep, and the plaintiff took the child in his arms into the car. The train stopped a shorter length of time than usual, and before the plaintiff could place the sleeping child on a seat, the train started, although he acted with all possible promptness. When the train started, the plaintiff, after

placing the child on the seat, hurried to the platform of the coach to get off. A negro porter of the railway company was standing on the steps of the coach from which the plaintiff expected to alight, and was blocking the steps so that the plaintiff could not get off at that point. The conductor of the train, the individual defendant in the case, cursed the porter for blocking the steps, and called to the plaintiff to cross over to the platform of the next coach and to leave the train from that point. At the depot at Dewy Rose there was no wood platform, but the ground between the adjoining tracks was leveled up even with the rails, forming a smooth dirt landing, extending a little on each side of the depot. Beyond this dirt landing, in the direction in which the train was going, there was a ditch on each side of the railroad and an embankment across the ditch. The plaintiff attempted to leave the train under the direction of the conductor and at the point where the conductor directed him to get off. It was dark at the time, and the plaintiff could not see that the train had passed the dirt platform, and could not tell the speed that the train had acquired. He relied upon the directions given to him by the conductor, assuming, because of such directions, that it was safe to leave the train at that point. The train had passed the dirt platform above described and was running faster than the plaintiff had supposed. The train was a light train, consisting of only two coaches and an engine, and, because of being behind its schedule time, acquired considerable speed in a short space of time, and could move very much farther than an ordinary railroad train in the time taken by the plaintiff. When the plaintiff attempted to alight he stepped into the ditch above referred to, and, because of stepping into the ditch and because of the speed of the train, was given a violent wrench and was thrown against the embankment, and received the injuries for which he sought to recover damages.

The evidence for the defendants conflicts sharply with the evidence of the plaintiff, both as to how the accident occurred and as to the extent of the injuries received. The conductor testified, that he did not see the plaintiff, did not know that he had gotten on the train for the purpose of assisting passengers, did not give the plaintiff any direction to cross from the platform of one coach to the platform of another, or to get off at that point, and did not curse the negro porter, and, in short, contradicted every statement made

by the plaintiff as to the manner in which the injuries were received, and also denied the existence of any ditch at that place, and said that the train had stopped an unusual length of time that night at Dewy Rose, and that the plaintiff had ample time in which to go into the coach and get off without injury, in the exercise of ordinary diligence. The conductor's evidence is corroborated by other employees of the company. According to the evidence of the plaintiff and expert testimony in his behalf, he received very severe and probably permanent injuries. According to the testimony for the defendants, both lay and expert, he received very slight, if any, injuries. This court will not discuss the evidence except as it may be necessary to do so to illustrate the rulings on special assignments of errors of law. The verdict settles the conflicts in the evidence, and, so far as this court is concerned, establishes the truth of the testimony in behalf of the plaintiff, not only as to the manner in which he was injured, but also as to the extent of his injuries, and, unless the trial judge committed a material error on some question of law, which was presumptively prejudicial to the defendants, the verdict will not be disturbed.

1. It is insisted by the plaintiffs in error that even conceding the truth of the evidence in behalf of the plaintiff, the verdict is contrary to law, because it shows such negligence on his part as would preclude him from a recovery; that his act in getting off the moving train in the dark was so obviously dangerous that he was not relieved from negligence in attempting to do so, even under the directions given him by the conductor. It is contended that to get off a moving train in the dark and at a place other than the platform or regular place of getting off is per se such an act of negligence as would in any event prevent a recovery. Many cases are cited from the Supreme Court of this State in the elaborate brief of counsel for plaintiffs in error, which it is claimed sustain this view of the law, some of them being *Jones v. Georgia, Carolina & Northern R. Co.*, 103 Ga. 570 (29 S. E. 927); *Barnett v. East Tenn., Va. & Ga. R. Co.*, 87 Ga. 766 (13 S. E. 904); *W. & A. R. Co. v. Earwood*, 104 Ga. 127 (29 S. E. 913); *Whatley v. Macon & Northern R. Co.*, 104 Ga. 764 (30 S. E. 1003); *Roul v. East Tenn., Va. & Ga. R. Co.*, 85 Ga. 197 (11 S. E. 558), and many others. It would be unprofitable to consider each one of these cases. It is sufficient to say that we have examined each one and find that none of them sus-

tain the view urged by learned counsel. Nowhere does the Supreme Court lay down the proposition of law that, regardless of the facts, it is such negligence on the part of a passenger or licensee to leave a moving train as would preclude a recovery. The question of negligence in each particular case is one of fact which must be determined by the jury alone, and the court can not, as a matter of law, lay down any inflexible rule on the subject. In the present case the negligence on which a recovery is predicated is the negligence of the conductor in telling the plaintiff to get off a moving train under the circumstances proved by the plaintiff. It must be remembered in this connection that while the plaintiff was not a passenger, neither was he a trespasser. He was lawfully on the train for the purpose of assisting a woman with two infant children, who were passengers thereon. Conceding that the railway company was under no duty to anticipate his presence on the train, or to foresee his purpose to leave the train, yet when his presence and his intention became known to the employees of the company, it was their duty to exercise ordinary care to prevent his injury. The principles of law embraced in the foregoing statement are well settled by repeated decisions of the Supreme Court of this State. In *Suber v. G., C. & N. R. Co.*, 96 Ga. 42 (23 S. E. 387), it is held that a person going upon a train to assist his sister and her children, who expected to become passengers, was lawfully on the train, and, when his presence was known, was entitled to the duty of ordinary care on the part of the employees of the railway company. And in the case of *Macon, Dublin & Savannah R. Co. v. Moore*, 108 Ga. 84 (33 S. E. 889), the *Suber* case, *supra*, is cited with approval, and the doctrine reaffirmed that a person on a train under such circumstances is there lawfully, and is entitled to ordinary care by the employees of the railway company, when his presence becomes known. In the case of *Seaboard Air-Line Railway v. Bradley*, 125 Ga. 193 (54 S. E. 69, 114 Am. St. R. 196), the *Suber* case is again approved and the doctrine therein stated reaffirmed. These decisions establish that the plaintiff was lawfully upon the train, and that when the conductor discovered his presence, and his purpose to leave the train, the duty of exercising ordinary care devolved upon him to prevent injury to the plaintiff. Whether the conductor did so under the facts proved in behalf of the plaintiff was a question for determination by the jury. Under these facts it was the prov-

ince of the jury to say whether the act of the conductor in directing the plaintiff to leave the train at that time and place was or was not an act of negligence, or whether, under the circumstances, the danger of doing so was so manifest and clear that notwithstanding the directions of the conductor, the plaintiff was guilty of such negligence in attempting to alight at that time and place as would prevent a recovery. If the conduct of the conductor was negligent, and if the obedience to the directions of the conductor was not negligence of a culpable character, then these facts, under the law, would have authorized a recovery. This proposition is conclusively established by repeated decisions of the Supreme Court. *W. & A. R. Co. v. Wilson*, 71 Ga. 22; *Southwestern R. Co. v. Singleton*, 67 Ga. 306; *Coursey v. Southern Ry. Co.*, 113 Ga. 297 (38 S. E. 866). In the *Coursey* case the plaintiff had, by mistake, gotten upon the wrong train. Upon discovering that fact she told the conductor of her mistake, and, after the train was leaving, she was directed by him to get off. Obeying this direction she was hurt. The sole negligence alleged in the petition was the negligence of the conductor in telling her to get off. The court below granted a nonsuit, and the Supreme Court reversed this judgment, holding that it was a question of fact. In *Turley v. A., K. & N. R. Co.*, 127 Ga. 594 (56 S. E. 748, 8 L. R. A. (N. S.) 695), it is held, in effect, that it is not, as a matter of law, negligence to leave a moving train, unless it appears that the danger attending the attempt to alight is so great as to be obvious to a person of common prudence and ordinary intelligence, and that ordinarily, in cases of this kind, the question of what is or is not negligence is a question for the jury. In the *Turley* case, Mr. Justice Beck, speaking for the court, says: "We can not agree with counsel for the defendant, who insist that the plaintiff 'knew the train was running at a speed that made it hazardous to attempt to alight therefrom in the prevailing darkness,' and 'knew more than this, that the train was not stopping, but was increasing its speed; and, with this situation clearly before him, chose not to avoid, but to risk the danger,' and that consequently the plaintiff's injury was not the result of the defendant's negligence, but of his own recklessness." The case of *Simmons v. S. A. L. Ry.*, 120 Ga. 225 (47 S. E. 570), which apparently supported the proposition contended for by the plaintiffs in error was expressly overruled, and it was announced that the *Suber* case,

supra, stated the correct rule on the subject. We conclude that the contention of the plaintiffs in error on the points above discussed is not supported by the decisions of the Supreme Court, and the proper rule on the subject, deduced from all the decisions, is that the question of negligence is one of fact, to be determined by the jury under the circumstances of each particular case.

2. A medical expert, introduced by the plaintiff, testified as to the character and extent of the plaintiff's injuries. The defendants introduced a witness by whom they sought to impeach and discredit this medical expert by showing that on a previous occasion he had examined this witness and had stated that the witness was suffering from spinal concussion or "railway spine," the same diagnosis which the expert had made of the plaintiff's injuries,—when in fact the witness had never been in a railroad accident and had never suffered from any spinal trouble. This testimony was excluded by the court. We hardly think that the value of the testimony of a medical expert can be impeached by instances of special cases in which he might have been mistaken in his diagnosis. To hold this, it seems to us, would bring in issue the question as to whether in each particular case the diagnosis was correct or incorrect. The correct rule is laid down by Mr. Wigmore, in his work on Evidence, Vol. 2, p. 1148: "Proof of such particular instances of error by other witnesses is generally regarded as inadmissible, and for reasons analogous to those of the character rule, namely, confusion of issues by the introduction of numerous subordinate matters, controversies involving comparatively trivial matters, and unfair surprises by leaving the impeached witness unable to surmise the tenor or the time of the supposed conduct which might be attributed to him by false testimony." While it might strike the ordinary mind that a medical expert could not be safely relied upon in his diagnosis, where he had stated upon an examination that a person was suffering from spinal concussion or "railway spine," when in fact the person had never been the victim of any railroad accident, or had never suffered from any spinal complaint, and while it might be argued that this medical expert, in making a similar diagnosis of the plaintiff's injuries, was indulging somewhat in a fad or a favorite theory, yet it must be manifest to any thinking mind that it would be unsafe, as well as unjust to the medical expert, to allow such special method of attack, unless at the same time

the expert thus attacked were allowed an opportunity of meeting the attack, by showing that the witness who testified that he was not injured had been in fact injured, and was testifying falsely, and that as a matter of fact his diagnosis of the witness's condition was correct. In the administration of practical justice by the courts this method of impeachment should not be permitted.

3. In support of the medical expert who testified in behalf of the plaintiff, testimony, to which the defendants objected, was admitted, to the effect that the expert had held many positions in different sanitariums and hospitals where he had had extensive experience in medicine and surgery. One of the methods of proving expert knowledge is to show expert opportunities and experience, and clearly the testimony was admissible for this purpose.

4. Two of the grounds in the amended motion for a new trial assign error upon the charge of the court to the effect that the railway company was under a legal duty to allow the plaintiff a sufficient time in which to get off the train, after his intention to leave had become known to the conductor. It is contended that this charge was hurtful to the defendants, and was not on any one of the issues made by the pleading, as no negligence was alleged in this respect. An inspection of the brief of evidence discloses that the defendants contended that the plaintiff did have time to get off the train, and that the railway company in this respect performed its duty; and this testimony was met by the plaintiff by showing that he was not given sufficient time in which to get off. No objection to the introduction of this evidence was made by either side on the ground that it was not covered by the pleading. The judge stated a correct abstract principle of law, and, while the instruction was not required by the pleading, it was based on evidence introduced on both sides. Consequently it was not reversible error to charge on the subject, and certainly the defendants should not be heard to complain that the charge covered an issue which they had injected by their evidence. However, the court subsequently instructed the jury that the plaintiff could only recover upon the allegations of negligence made in the petition.

5. Objections are made to instructions of the court as to the presumption against a railroad company on proof of injury, and to the failure to charge that this presumption did not arise against the individual defendant. As to the railway company the charge

on this subject is based upon the statutory presumption. Civil Code (1910), § 2780. It is insisted that even as against the railway company, this charge was improper, as the plaintiff was not hurt by "the running of the locomotive, cars, or machinery" of the railway company. We do not concur in this opinion. It would be entirely too restricted a view to take of the statute, and would limit its application to cases where persons were hit or run over, or came in physical contact in some other way with the locomotive, cars, or machinery of the defendant while they are actually in movement. The statutory presumption applies to injuries received by persons alighting from trains or locomotives. The momentum imparted to the body of a person alighting from a moving train, which throws him against an obstacle on the outside, is as much a cause of the injury as the violent contact with the obstacle or obstruction. The case of *Georgia Ry. & Electric Co. v. McAllister*, 126 Ga. 447 (54 S. E. 957, 7 L. R. A. (N. S.) 1177), relied upon by the plaintiffs in error, is not in point. In the *McAllister* case the plaintiff had actually left the car, had crossed to the sidewalk, and was walking home when the injury occurred. In other words, he had severed all connection with the operation of the street-car when he was hurt. In *Georgia Railway & Electric Co. v. Reeves*, 123 Ga. 697 (51 S. E. 610), and *S. A. L. Ry. v. Bishop*, 132 Ga. 71 (63 S. E. 1103), it is clearly ruled that a person injured in alighting from a moving train, or even from a stationary train, by the running of the company's locomotive, cars, or machinery is entitled to the statutory presumption.

As to the objection that the court did not instruct the jury that this presumption did not apply to the individual defendant: The court did tell the jury that it applied to the railway company, and, under the maxim *expressio unius est exclusio alterius*, this was in effect telling the jury that it did not apply to the individual defendant. In the usual general statement made in the charge on the subject of presumption, the court did charge the jury the general rule that the burden was upon the plaintiff to make out his case against the defendants, and the only exception stated was the presumption against the railway company. Assuming that the jury were men of ordinary intelligence, they must have understood, from this statement and the exception, that the presumption applied only to the railway company, and not to the individual defendant. How-

ever this may be, we think that if he desired a more specific charge on this subject, he should have requested it in writing.

6. The following excerpt from the charge is objected to: "If you are in possession of facts that will authorize you to estimate in dollars and cents any branch of injury received, the loss of ability to work or otherwise, you can fix that amount at whatever the testimony authorizes for damages along that line." It is objected that this charge did not present to the jury any fixed and certain rule by which the damages should be estimated, and, in elaborating this ground of the motion, learned counsel insist that it was the duty of the judge to charge as to the use of the mortality and annuity tables, and that the judge erred in failing to charge as to reducing to its present value the plaintiff's entire future loss. It has been held by the Supreme Court that the jury, in estimating damages, are not compelled to use the mortality and annuity tables, and the court is not required to give them in charge unless requested. In the standard charge prepared by the Supreme Court in *Florida Central & Peninsular R. Co. v. Burney*, 98 Ga. 1 (26 S. E. 730), it is expressly stated that these tables are not binding on the jury. The jury are at liberty, in estimating the damages, to use the result of their own observation and experience, aided by the testimony as to the extent of the injuries and the resulting damages. *R. & D. R. Co. v. Allison*, 86 Ga. 145 (12 S. E. 352, 11 L. R. A. 43): *Southern Ry. Co. v. Scott*, 128 Ga. 244 (57 S. E. 504). The size of the verdict in the present case would indicate either that the jury did in fact reduce the future damages to present value, or did not consider the question of permanent damages at all. Without a more specific request to charge on the subject of damages, the general charge as given was not prejudicial.

7. After the court had concluded the charge to the jury and had directed them to retire and make up their verdict, counsel for the plaintiff arose, and in the presence of the jury suggested that a certain portion of the charge, according to the practice in the United States court, be corrected, whereupon the judge sent the jury out, and, after an argument in regard to this part of the charge, had them return, and corrected his charge on the subject of punitive damages, distinctly and expressly withdrawing from their consideration this portion of the charge, as not applicable to the case, under the evidence. Of course, this part of the charge was inappli-

cable to any of the issues made by the pleading or the evidence, and the court very properly corrected it on suggestion of counsel for the plaintiff. It is immaterial that in doing so he followed a practice pursued in the United States court, and it is wholly immaterial that in the presence of the jury counsel for the plaintiff asked him to do so according to the practice in such matters in the United States court. The only material question was, was this portion of the charge erroneous? If it was, it was the duty of the court to correct it, and as to that matter it would seem to have been the duty of counsel to acquiesce in the correction. Judges rely upon attorneys in a case to aid them in giving proper instructions on the issues submitted, and to assist them in preventing as far as possible any injustice through erroneous instructions.

8. The court admitted, over objection of the defendants, the evidence of the plaintiff's wife that after his injuries had been received he was heard to "moan and groan" frequently during his sleep. It is objected that this testimony was irrelevant, and that the moaning and groaning took place long after the accident. It has been held that involuntary exclamations of pain made soon after an injury has been received are to be regarded not as self-serving declarations, but as symptoms, and are admissible in evidence. *Georgia Ry. & Electric Co. v. Gilleland*, 133 Ga. 621 (66 S. E. 944). It would seem to follow that as long as the injured person was still suffering from the effect of injuries which he had received, any involuntary exclamation made by him, indicating that he still suffered from the effects of such injuries, would be admissible for what they were worth. Whether the moans and groans of a man in his sleep are caused by pain due to physical injuries or not, it certainly can not be claimed that they are in any sense self-serving declarations. They would seem to be more in the nature of subjective symptoms of physical suffering. Certainly, where the evidence is clear, irrespective of this moaning and groaning while asleep, that the plaintiff had incurred injuries of a severe character, it would be absurd to grant a new trial on the ground that the court had erred prejudicially in admitting evidence of these involuntary exclamations made by the plaintiff while asleep.

We have examined the record very carefully in connection with all the assignments of error, and we find no reason for reversing the judgment refusing another trial.

Judgment affirmed.

3706. DICKSON *v.* MATTHEWS, for use, etc.

Where A. sells goods to B., A. can not recover the purchase-price from C., although C. had contracted with B. to pay him for the goods. Nor can A. use the name of B., suing for his use, for the purpose of recovering against C.

DECIDED FEBRUARY 12, 1912.

Appeal: from Fulton superior court—Judge Ellis. June 14, 1911.

George Westmoreland, Mark Bolding, for plaintiff in error.
Smith, Hammond & Smith, contra.

POTTLE, J. Dickson employed Matthews to do photographic work of a specified nature. The written contract between them provided, amongst other things, that Dickson would "pay the actual invoice cost of all material used in making the negatives." Matthews bought from the Glenn Photo Company certain material to be used in the work described in his contract with Dickson, and instructed the company to charge the account to Dickson, exhibiting to the company's salesman the contract above referred to. The company sued Dickson on the account and the case went to the superior court on appeal from the justice's court. On the trial of the appeal, at the conclusion of the plaintiff's evidence, the court intimated that a nonsuit would be granted; whereupon the plaintiff, over the defendant's objection, was allowed to amend by substituting the name of Matthews, suing for the use of the plaintiff. The case then proceeded, and resulted in a verdict for the plaintiff. The defendant's motion for a new trial was overruled, and exception has been taken to this ruling. The points made here are that the amendment introduced a new party plaintiff and a new cause of action, and that even if the amendment was properly allowed, the verdict was not authorized by the evidence.

Since, under the Civil Code (1910), § 5689, a plaintiff may amend by substituting another person in his stead, suing for his use, "when it becomes necessary for the purpose of enforcing the rights of such plaintiff," a general objection to the allowance of such an amendment would not be well taken. The amendment is allowable, and, when made, it will be determined, upon a consideration of the evidence, whether the case can proceed as amended and a recovery be had in favor of the plaintiff. This is true even where the amendment is offered after the introduction of evidence under which

the amendment appears to be improper; because new evidence may be thereafter admitted making the amendment proper. The real question is, with the amendment allowed and the evidence all in, has such a case been made as would authorize a recovery by the nominal or substituted plaintiff, for the benefit of the usee, the original plaintiff. So dealing with the present case, we are clear that the verdict against the defendant can not stand. Under the admitted facts there was no contractual relation between the defendant and the real plaintiff, the Glenn Photo Company. Dickson did not buy the goods from that company, nor promise to pay it for them, nor did he authorize Matthews to do so for him. It is true he contracted with Matthews to pay for material such as that delivered by the company to Matthews, but this was a contract with Matthews upon which he alone could sue. The company could not sue Dickson for a breach of his contract with Matthews, and can not use Matthews's name to accomplish by indirection what it could not do directly. From the plaintiff's standpoint the case is this: Matthews owes the plaintiff; Dickson owes Matthews. Ordinarily an action upon a contract, either express or implied, must be brought in the name of the party in whom the legal interest is vested. Civil Code (1910), § 5516. The exception is where the legal or nominal interest is in one person and the real interest in another. In such case the latter can proceed by using the name of the former as nominal plaintiff. The case here presented is not such a case. The Glenn Photo Company has neither the legal nor the equitable right to use a claim of Matthews against Dickson as the basis for recovery against Dickson of a claim of the company against Matthews. What we hold does not offend the just rule that where one appropriates the property of another, the law implies a promise to pay for it. Nor is any question of agency involved. There was no evidence that Dickson authorized the purchase of the material on his account. The case rests on the contract between Matthews and Dickson, and, as such, can not stand.

Judgment reversed.

3710. McCranie, guardian, v. Shipp, administrator.

POTTE, J. There being in the bill of exceptions no exception to any final judgment, but only an exception to a judgment striking the defendant's pleas, no question is presented which this court has jurisdiction to decide. This is true even though there is a recital in the bill of exceptions that the case was finally terminated by a judgment in favor of the plaintiff. *Simmons v. Peagler*, 7 Ga. App. 252 (66 S. E. 629); *Whidden v. Merry*, 8 Ga. App. 564 (69 S. E. 1085).

Writ of error dismissed.

DECIDED FEBRUARY 12, 1912.

Motion to dismiss the writ of error.

Alexander & Gary, for plaintiff in error.

J. P. Knight, J. A. Wilkes, Shipp & Kline, contra.

3767. BARWICK v. SLAUGHTER.

HILL, C. J. Where no question of law is raised, and the evidence on the trial was in conflict, the judgment of the superior court, overruling the certiorari, will be affirmed, with ten per cent. damages on the amount of the judgment obtained in the city court, for delay on account of suing out and prosecuting the writ of error.

Judgment affirmed, with damages.

DECIDED FEBRUARY 12, 1912.

Certiorari; from Grady superior court—Judge Frank Park.
March 6, 1911.

M. L. Ledford, for plaintiff in error.

3775. BUSH v. THE STATE.

1. The right of one whom the court judicially knows to have been legally appointed and commissioned as solicitor of a city court can not be brought in question by plea in abatement to an accusation drawn by him.
2. The removal of an officer from the county for which he was elected or appointed, to another county in this State, does not vacate the office, until the fact has been judicially ascertained.

DECIDED FEBRUARY 12, 1912.

Accusation of gaming; from city court of Miller county—Judge Bush. October 3, 1911.

W. I. Geer, for plaintiff in error.

P. D. Rich, solicitor, contra.

RUSSELL, J. Before the arraignment of the plaintiff in error he filed a plea in abatement, which the court struck, and this ruling is the ground of exception presented by the writ of error. The plea in abatement conforms to the requirements laid down in *McRae v. State*, 71 Ga. 99, *Mize v. State*, 135 Ga. 295 (69 S. E. 173), *Folds v. State*, 123 Ga. 167 (51 S. E. 305), and *Wall v. State*, 126 Ga. 549 (55 S. E. 484), in that it was filed at the proper time; for, this being an accusation, of course there had been no opportunity for the defendant sooner to object. However, in our opinion the court properly struck the plea in abatement, for the reason that the title of the acting solicitor of the city court could not be brought in question by this plea. The court judicially knew that Mr. Rich was the duly commissioned solicitor of the city court of Miller county, and, taking all of the allegations of the plea to be true, he was at least the de facto officer of the court. Furthermore, the plea was defective in that there was no statement that the office of the solicitor of the city court had been judicially ascertained to be vacant in a legal sense by reason of the fact that it had been judicially ascertained that Mr. Rich had moved his residence from the county of Miller to the county of Decatur. The exact point was decided by the Supreme Court in the case of *Channell v. State*, 109 Ga. 152 (34 S. E. 354), in which Justice Lewis, delivering the opinion of the court, says: "Section 229 of the Political Code [Political Code of 1910, § 264] describes how offices in this State may be vacated, and one of the methods (see subdivision 5) for vacation is, 'By the incumbent ceasing to be a resident of the State, or of the county, circuit, or district for which he was elected. In the first case the office shall be vacated immediately; in the latter cases, from the time the fact is judicially ascertained.' It is manifest from this provision that when an incumbent of an office has moved from the county for which he was elected to another county in this State, the office is not thereby immediately vacated, and does not become so until the fact has been judicially ascertained."

It can readily be seen that the court was not called upon to try two issues at once,—the validity of Mr. Rich's title to the office, and the guilt of the accused,—in one and the same proceeding. The proper method of testing the validity of Mr. Rich's title was by

quo warranto, brought by any one interested in the office; and, as ruled by the Supreme Court, any citizen may file the writ, because all are interested in the proper discharge of the duties of the office, and the proper qualifications of the incumbent. *Whitehurst v. Jones*, 117 Ga. 803 (45 S. E. 49), and cases cited. However, loss of citizenship does not result from a change of residence not intended to be permanent. By demurring to the plea in abatement the solicitor of the city court admitted, for the purposes of that particular hearing, that he had changed his residence; but it is not altogether clear, from the allegations of the plea, that if the plea had not been demurred to, the evidence would have sustained the proposition that the office had become vacant by the removal of Mr. Rich from the county of Miller to the county of Decatur. There must be either the tacit or the explicit intention to change one's domicile before there is a change of legal residence. While it is provided in the Civil Code, § 2181, that the domicile of a married man shall be the place where his family resides, the wife (if there be only a wife) or the wife and family may, for purposes of temporary convenience, or recuperation from ill health, or for the purpose of educating the children, reside for a long time at a place not intended as a permanent abode, without effecting any change of legal residence; this for the reason that while there is a physical removal, there was never, on the part of those who moved, an intention to abandon a former domicile.

Judgment affirmed. Pottle, J., not presiding.

3860. HEARD *v.* THE STATE.

One occupying the relation of employee to the owner of a livery stable can not, although he works in the stable, be convicted either of keeping intoxicating liquors at a public place, or of keeping such liquors on hand at his place of business, when the uncontradicted evidence discloses affirmatively that the liquors were not his, and wholly fails to show that he aided or abetted the owner in storing the liquors in the stable or had any knowledge that they were there.

DECIDED FEBRUARY 12, 1912.

Misdemeanor; from city court of LaGrange—Judge Harwell.
November 2, 1911.

W. U. Mooty, E. A. Jones, for plaintiff in error.

Henry Reeves, solicitor, contra.

POTTLER, J. Heard was tried and convicted under an accusation charging him with keeping intoxicating liquors at a public place, and with keeping such liquors on hand at his place of business. Taken most favorably for the State, as it must be, the material evidence was as follows: The accused was a bookkeeper in a livery stable owned by one Scott. About two months before the warrant was issued, some six or eight casks of whisky and several barrels of beer were found in a cellar under the livery stable and connected with the stable by means of a trap-door. All of the casks except one were "marked to W. L. Heard, Standing Rock, Alabama." The key to the trap-door was obtained from Scott by the officer who made the search. Heard could not unlock the trap-door, because he was paralyzed and crippled in both arms. The whisky was the property of Scott, and the accused had no interest in it. The whisky was ordered by Scott in Heard's name, and, with his consent, was to be sent to Standing Rock, Alabama, to be conveyed thence to Dadeville, in Alabama, where Scott had some negroes doing grading for a railroad company. The whisky came to Standing Rock, and Scott instructed Beall, one of his employees, to take the whisky from Standing Rock to Dadeville, and did not know that Beall had brought it to his place of business in West Point, until it was found there by the officer who made the search. It does not appear how or by what agency the beer reached the cellar of Scott's stable, nor who owned it. There is no evidence from which it could be inferred that the accused had any knowledge that either the whisky or the beer was in the stable, or that he was connected in any way, directly or indirectly, with having it brought there.

Manifestly the conviction can not stand. Granting that Scott knew the liquor was there, guilty knowledge of the employer can not be imputed to the employee. If the evidence had shown that the accused had confederated with Scott or abetted him in the illegal act, he would be guilty. In this case proof of knowledge by Heard that Scott was keeping the whisky in his place of business, coupled with the fact that the accused allowed the use of his name to bring the liquors to a near-by town in Alabama, might authorize a finding that he was so connected with the illegal act as to make

him guilty. But mere consent, without more, to have the liquors shipped in his name to another State does not make the accused guilty. The conviction rests wholly upon suspicion, and must be set aside. This case, upon its facts, differs from *Toles v. State*, ante, 444 (73 S. E. 597), in that in the latter case there were circumstances authorizing a finding that Toles aided and abetted the employer in the illegal act.

Judgment reversed.

3137. KIGHT, administrator, v. ROBINSON.

1. Parol evidence is inadmissible to extend or increase the amount of indebtedness specifically secured by a mortgage, where the mortgage does not show that it was given to secure future advances. Evidence that a mortgage was intended to secure a note not specified in it is properly repelled, in the absence of an averment that, by reason of fraud, accident, or mistake, the correct amount was not stated.
2. A mortgage foreclosure is a proceeding *stricti juris*, and the lien of the mortgage can not be extended to secure indebtedness other than that specifically mentioned in the condition of the mortgage.

DECIDED FEBRUARY 24, 1912.

Affidavit of illegality; from city court of Wrightsville—Judge Kent. November 21, 1910.

William Faircloth, Charles S. Claxton, for plaintiff.

E. L. Stephens, for defendant.

RUSSELL, J. Mrs. N. J. Kight foreclosed a chattel mortgage executed by Louis Robinson, and to the foreclosure the mortgagor interposed an affidavit of illegality. The mortgage and the note which it was given to secure were included in the same writing. By its terms Robinson promised to pay N. J. Kight, or order, on October 1, 1908, \$500, with interest at maturity at the rate of 8 per cent. per annum; and, to secure the payment of the note, he mortgaged a growing crop of 75 acres in cotton and 38 acres in corn on a designated farm, and several head of live stock. The condition of the note was that if he should "truly pay the above note at maturity, then this mortgage to be null and void." There is no intimation, from the language of the note or mortgage, that it was executed to secure future advances. The consideration of the note is not stated further than by the usual phrase "value received." The affidavit of illegality set up that the mortgagor had paid the

plaintiff the amount of the mortgage, which was given to secure payment for supplies to be furnished to make the crop for the year 1908, but specifically denied that the mortgage was to secure the purchase-price of any guano. Another ground of the affidavit of illegality was that the plaintiff was not entitled to recover more than three fourths of the amount of the account for supplies, because she had not at any time applied to the ordinary and had her weights and measures marked, sealed, and stamped as required by law. Another ground of illegality was that the mortgage was void on account of usury. Upon the trial (in which all issues of fact were submitted to the judge, without the intervention of a jury) a judgment was rendered finding the defendant to be indebted to the plaintiff \$65.66, with \$10.51 interest; and to this judgment exception is taken.

There is no conflict as to the fact that the defendant sustained, by uncontradicted testimony, the ground of illegality based upon the provisions of § 1882 of the Civil Code (1910), and established by the plaintiff's own witnesses, that he was entitled to have a deduction of one fourth of \$330.89 of supplies sold to him by the plaintiff. It was also admitted that the defendant had paid, upon the supplies advanced him from the store, \$368.08. Under this view of the evidence the defendant would have owed for supplies from the store only \$361.70, instead of \$444.42, and therefore would also have sustained the ground of illegality in which he asserted that he owed nothing upon the mortgage. Under this view of the case it seems to us that the *defendant* could well have complained of the judgment for \$65.66 rendered against him, but he has not done so. So much as to the evidence which was admitted by the court; and upon this branch of the case it appears that the only ground for complaint by the plaintiff consists in the fact that if she was entitled to recover at all she was entitled to a finding for a larger amount. This contention rests upon two propositions: (1) that under the evidence which was excluded and not considered by the court, the levy of the mortgage *fi. fa.* was entitled to proceed for the full amount of the *fi. fa.*, and (2) that even if the first proposition be not sound, the judge should have entered judgment for \$76.34, instead of \$65.66, upon the evidence which the judge did consider. We shall therefore first consider the assignments of error which complain of the exclusion of testimony.

It appears, from the evidence, that the defendant purchased from the plaintiff supplies to the amount of \$444.42, and also bought of her \$225 worth of guano. The plaintiff's contention in the lower court was that the mortgage for \$500 was given to secure this entire sum of \$669.42. The plaintiff admitted that Robinson had paid \$368.08 upon the running bill at the store. The difference between the two, of course, would be \$76.34. As evidence of the indebtedness for guano the plaintiff tendered in evidence a note for \$225, payable to the Mutual Fertilizer Company, or bearer, signed by Robinson. This note, upon objection, the court repelled from the evidence, and, in his judgment, he states that it was not considered. As to whether the guano was intended to be included in the \$500 note, the parties were in direct conflict in their testimony; and for that reason the judge would have been authorized to find either way upon the issue; but since the court states, in the judgment, that the note, which was admitted by both parties to represent the purchase-price of the guano, was not considered by him, the question is squarely raised as to whether evidence was admissible to the effect that while the mortgage purported to secure an indebtedness stated in its face to be \$500, it was in fact intended to secure a considerably larger amount. In other words, where the amount of the note to be secured by the mortgage is definitely stated in the mortgage, can it be shown aliunde that a different amount was intended to be secured, and that thereby the lien of the mortgage, for an amount different from that specified therein, attached to the personal property upon which a lien was created? We have been unable to find any adjudication upon the direct point in this State. We are cited by counsel for the plaintiff to the rulings in *Hester v. Gairdner*, 128 Ga. 531 (58 S. E. 165), and *Emerson v. Knight*, 130 Ga. 105 (60 S. E. 255). Neither of these cases, however, appears to be in point. *Judgment affirmed. Pottle, J., not presiding.*

3241. REDFEARN v. THOMPSON.

1. In an action for slander, where the language alleged to have been used imputes to the plaintiff guilt of an indictable offense, he establishes a prima facie case upon proof that the slanderous language, substantially as alleged in the petition, was used by the defendant; and, without more, the plaintiff is presumed to be innocent of the crime charged.

This is true whether the defendant pleads justification or not. Therefore it was proper, where the alleged slanderous words charged a crime, to instruct the jury that "the plaintiff is presumed to be innocent of the charges imputed to her by the alleged slanderous words of the defendant, set out in the plaintiff's petition; and until or unless it is overcome by satisfactory proof, this presumption of innocence in the plaintiff's favor remains with her through every stage of the trial."

2. Evidence that the plaintiff's general character or reputation was bad at the time the defendant used the alleged slanderous words, or before that time, presents no defense to an action for slander, based upon words charging a specific crime. The fact that the character of the plaintiff in an action for slander is bad may serve to mitigate the damages, but can not prevent recovery.
3. The court having properly instructed the jury that evidence of the bad character of the plaintiff, who sought to recover damages for an alleged slander, might be considered by the jury in assessing the damages, it was not error, in the absence of an appropriate timely request, to omit any further instruction upon the subject. The language thus used in referring to the evidence upon the subject of the plaintiff's character was favorable to the defendant, and the jury could not have been misled thereby into increasing such damages as might be awarded; and if fuller instructions were desired they should have been requested.
4. The finding of the court, when sitting in lieu of common-law triors, as to the competency of jurors, is not subject to review. A challenge for principal cause being considered as a matter of law, a judgment of the trial court thereon may be reviewed, but in case of a challenge to the favor, the decision of the judge as trior, being essentially the determination of a question of fact, is final and conclusive. Therefore, the judge's finding as to the jurors who were attacked for prejudice and bias can not be made a ground of error.
5. An affidavit given by a juror after the verdict was rendered, to the effect that he did not voluntarily assent to the verdict, can not be received. A juror will not be heard to impeach the verdict after its record.
6. The evidence authorized the verdict, and there was no error in refusing a new trial.

DECIDED FEBRUARY 24, 1912.

Action for slander; from city court of Thomasville—Judge W. H. Hammond. January 14, 1911.

Fondren Mitchell, Branch & Snow, for plaintiff in error.

Roscoe Luke, Theodore Titus, contra.

RUSSELL, J. Mrs. Thompson brought suit for slander, and obtained a verdict for \$500. Exception is taken to the judgment overruling the defendant's motion for a new trial. Inasmuch as it can not be said that the verdict is without evidence to support it, we shall not discuss the general grounds of the motion for new trial; for unless the verdict was induced by some of the errors as-

signed in the other grounds of the motion, there would be no theory upon which this court could order another trial.

The slanderous words alleged in the plaintiff's petition imputed to her guilt of the offense of adultery, and adultery and fornication. In the twelfth paragraph of the petition it was alleged that the defendant used certain slanderous words which imputed to the petitioner not only the crime of adultery, but also the crime of murder. By an amendment to his original answer the defendant pleaded justification, so far as it was alleged that he had charged the plaintiff with adultery. We purposely omit any reference to the loathsome details of the very voluminous testimony in the case. The defendant introduced a mass of testimony in support of his defense that the statements made by him were true, and, on the other hand, there was testimony which would have authorized the jury to believe that the statements made in regard to the plaintiff were wholly false. Testimony tending to impeach some of the witnesses was introduced. The court also permitted testimony to the effect that the general character of the plaintiff for chastity was bad, and, in rebuttal, testimony from other witnesses that her character was good. If, in spite of the evidence against her, the jury saw fit to award the plaintiff a verdict, the amount of the verdict—\$500—can not be said to be immoderate. And as the evidence in her behalf (which the result shows was believed by the jury) would have justified even a much larger finding in her favor, there was no error in refusing a new trial, unless some of the errors alleged in the motion for a new trial prejudiced the defendant's case and contributed to induce the verdict reached.

1. The court charged the jury as follows: "At the outset of this trial, gentlemen of the jury, the plaintiff, Mrs. Thompson, is presumed to be innocent of the charges imputed to her by the alleged slanderous words of the defendant, set out in the plaintiff's petition; and until or unless it is overcome by satisfactory proof, this presumption of innocence in the plaintiff's favor remains with her through every stage of the trial." Error is assigned upon this instruction, upon the ground that it gave to the plaintiff the benefit of a presumption applicable to criminal cases alone; there being no presumption of innocence in civil cases. We do not think that the exception is meritorious, and certainly the charge is not subject to the complaint made against it, as requiring the defendant to estab-

lish his plea of justification to the satisfaction of the jury beyond a reasonable doubt, as would be true in a criminal case. In fact, when the judge told the jury, in this charge, that the plaintiff—who was alleged to have been slandered by being charged with the commission of a criminal offense—was presumed to be innocent of the charge, it was tantamount to saying that if she proved the use of the alleged slanderous words, or if the defendant admitted them, it cast upon him the burden of proving the truth of his statements. The statement of the judge dealt with the burden of proof in the case, and not with the degree of mental conviction necessary to enable either the one party or the other to successfully carry that burden. This is plain when he says that the presumption is to be “overcome by satisfactory proof.” He did not tell the jury that the defendant had to establish the guilt of the plaintiff by proof satisfying their minds to the exclusion of a reasonable doubt. The case being a civil cause, the jury would naturally infer that by “satisfactory proof” was meant the preponderance of the evidence; but the judge not only instructed the jury very fully as to the meaning and effect of the phrase “preponderance of evidence,” but also defined the term “satisfactory proof” as being that degree of reasonable and moral certainty produced by a preponderance of the evidence. On principle it would seem, where one is slanderously charged with a crime, and he who makes the charge pleads justification, that the same burden of proof in establishing the truth of the alleged slander should be placed upon the defendant who pleads justification as would devolve upon the State were the plaintiff on trial for the crime itself; that is to say that the defendant in an action for slander or libel who has pleaded justification should be required to prove the crime which he has imputed to the plaintiff, by evidence which satisfies the jury of the plaintiff's guilt of the crime charged, beyond any reasonable doubt. This rule (which is sustained in 2 Starkie on Slander, 96, 2 Greenleaf on Evidence, § 426, and 2 Addison on Torts, 386) was for some time considered the rule in this State, as will be seen from the decisions in *Ransone v. Christian*, 56 Ga. 352, and *Williams v. Gunnels*, 56 Ga. 521, but in *Atlanta Journal v. Mayson*, 92 Ga. 640 (18 S. E. 1010, 44 Am. St. R. 104), these rulings were reviewed, criticised, and disapproved, with the statement that the question was not directly presented in either of them. Inasmuch, however, as the decision in

the case of *Atlanta Journal v. Mayson*, supra, was rendered by only two Justices, and the decision in *Williams v. Gunnels*, supra, was rendered by a full bench, if the question were now squarely before us it might well be said to be doubtful which precedent is controlling. However, as we pointed out above, the charge of the judge is not in conflict with the ruling in *Atlanta Journal v. Mayson*, supra, because, with his explanation of the term "satisfactory proof," as contained in the latter portion of his charge, it was very plain to the jury that the defendant was only required to establish his plea of justification by a preponderance of the evidence; the court not having charged the jury that the defendant was required to adduce a degree of proof which would satisfy the minds of the jury, beyond a reasonable doubt, of the plaintiff's guilt of the charge made against her by the defendant.

Neither did the court err in charging the jury that the plaintiff was presumed to be innocent of the crime imputed to her by the defendant. The instruction on this point was in reference to who carried the burden of proof, and not to the degree of proof necessary to enable one to carry it successfully. Every person is presumed to have a good character until the contrary is shown, and to be innocent of crime, until there is evidence of some kind to establish its existence. The presumption to which the judge referred exists regardless of the degree of proof which in any particular case may be necessary to rebut it. "There are many authorities which hold that the law presumes that a defendant has a good character. This was held in the case of *Stephens v. State*, 20 Tex. App. 269; and in the case of *Cluck v. State* [40 Ind. 270], the Supreme Court of Indiana held that the law presumes that every man has a good character, and that it would have been competent for counsel to have commented on such presumption. This rule is also laid down in *Sackett on Instructions to Juries*, p. 651." *Bennett v. State*, 86 Ga. 404 (12 S. E. 806, 12 L. R. A. 449, 22 Am. St. R. 465). In *Goggans v. Monroe*, 31 Ga. 301, the judgment of the lower court was reversed because it was held to have been error that the court refused to charge a request to the effect that the plaintiff was entitled to the legal presumption, in the absence of evidence proving to the contrary, that his character was good. In an action for slander, where the language alleged to have been used imputes to the plaintiff guilt of an indictable offense, he establishes a prima facie case

upon proof that the slanderous language, substantially as alleged in the petition, was used by the defendant; and, without more, the plaintiff is presumed to be innocent of the crime charged. This is true whether the defendant pleads justification or not. Therefore it is proper, where the alleged slanderous words impute a crime, to charge the jury that the plaintiff is presumed to be innocent of the charges imputed by the alleged slanderous words of the defendant, set out in the plaintiff's petition, and that until or unless it is overcome by satisfactory proof, this presumption of innocence in the plaintiff's favor remains through every stage of the trial.

2. Exception is taken to the following instruction in the judge's charge: "If you find the plaintiff to be entitled to recover, and if you believe, from the evidence, that the plaintiff's general character or reputation, at and before the speaking by defendant of the slanderous words in question, was bad, you would have the right to take that fact into account, in assessing the plaintiff's damages." Two assignments of error are predicated upon this instruction. Both of them are without merit. In the first it is insisted that if the jury should have believed, from the evidence, that the plaintiff's general character or reputation was bad, and if they should have believed that the defendant did not use the words charging the crime of murder, the plaintiff could not recover at all. In the second it is urged that the charge gave the jury no intimation as to how they could take the fact of the plaintiff's bad character into account, either by way of diminution or increase in the amount of damages. Evidence that the plaintiff's general character or reputation was bad at the time the defendant used the alleged slanderous words, or before that time, presents no defense in an action of slander predicated upon words charging a specific crime. The fact that the character of the plaintiff in an action for slander is bad may serve to mitigate the damages, but can not prevent recovery.

3. The court having properly instructed the jury that evidence of the bad character of the plaintiff who sought to recover damages for an alleged slander might be considered by the jury in assessing the plaintiff's damages, it was not error, in the absence of an appropriate timely request, to omit any further instruction upon the subject. The language used in reference to the evidence upon the subject of the plaintiff's character was favorable to the defendant, and the jury could not have been misled thereby into increasing

such damages as might be awarded, and if fuller instructions were desired they should have been requested.

4. Numerous affidavits were presented, attacking B. C. Johnson, the foreman of the jury, and S. M. Chastain, a member of the jury, upon the ground that they were incompetent, through prejudice and bias, and disqualified to serve as jurors, because they had formed and expressed a fixed opinion in favor of the plaintiff before they were empaneled to try the case. A counter-showing was made in behalf of these jurors, and the court held them to be competent, by overruling these grounds of the motion for a new trial. Among the affidavits in support of the jurors are those of a number of witnesses testifying to the good character of each of the jurors. It is insisted that the judge should not have considered the affidavits presented in support of the good character and standing of the jurors, but should have repelled the evidence upon the subject of the character of the jurors who were attacked. The judge was sitting as a trior, and we see no reason why he could not take into consideration the evidence as to the integrity and general good character of the jurors, in connection with the other testimony before him. Granting that testimony to the effect that the jurors were men of high character and good standing, would, in some instances, be irrelevant, there was, in the present instance, direct conflict between the witnesses as to material statements which were related as having been made by each juror. The jurors were each witnesses, and it is likely that the effect was to impeach these witnesses, by proving contradictory statements; and, in any case, proof of good character may tend to sustain a witness whose impeachment is sought by proof of contradictory statements.

But this is unimportant, for the finding of the judge upon the subject of a juror's prejudice or bias, or the absence of disqualifying prejudice or bias, is not subject to review. The decisions of the Supreme Court holding to the contrary were rendered prior to the passage of the act of 1856, which substituted the trial judge for the triors known to the common law. The cases of *Wade v. State*, 12 Ga. 25, and *Anderson v. State*, 14 Ga. 709, which are cited by counsel for plaintiff in error, are rulings made prior to the act of 1856. In the case of *Bishop v. State*, 9 Ga. 129-30, Judge Lumpkin well said, "It is the pride of the constitution of this country that all cases should be tried by jurors from whose breasts are ex-

cluded all bias and prejudice. To break down any of these safeguards, so wisely erected, and to suffer jurors to decide upon the life and liberty of the citizen, whose minds are poisoned by passion or prejudice, would be to stab the upright administration of justice in its most vital parts." And the decisions reversing the judgment of the court below refusing a motion for new trial in such cases were of a still earlier date. The question is fully discussed in *Turner v. State*, 114 Ga. 421 (40 S. E. 308). The distinction between a challenge for principal cause and challenges to the favor is there pointed out, and it is held, as to a principal challenge, that it must be principally a question of law, submitted to the court as a court, and that in such a challenge the decision of the court is subject to review. However, as to a challenge to the favor, it was held in that case (citing numerous authorities) that "Under our system, where the court is substituted for the triors to decide challenges to the favor (*Reid v. State*, 20 Ga. 688), the court's decision as to such a challenge is on a footing with that of the triors, and is final and conclusive. *Thomp. & Mer. Jur.* §§ 238, 249, et seq.; *Thomp. Trials*, § 100; 12 *Enc. Pl. & Pr.* 470. 'The decision of the judge, as trior, can no more be made a ground of error before this court than the verdict of triors could have been.' *Galloway v. State*, 25 Ga. 596." Consequently, the judge's finding as to the jurors who were attacked for prejudice and bias in this case can not be made a ground of error.

5. One of the jurors who tried this case made an affidavit that the verdict returned was not his verdict, that it did not speak his opinion of the law or of the evidence, and he did not concur in it; that he became ill during the deliberations of the jury, and needed a doctor, and so informed the other members of the jury, and insisted that he be given the services of a doctor, but that some of the members of the jury, including the foreman, told him that before he could get the services of a doctor he must allow them to return a verdict for the plaintiff, and that although he had been in favor of a verdict for the defendant, he agreed that the verdict for the plaintiff should be returned into court, in order that he might get a doctor and be relieved of his illness, but the verdict did not speak the truth of the case, according to his opinion, and was not his verdict. The judge declined to consider the juror's affidavit impeaching the verdict; and he could not have done otherwise, under

the repeated rulings in this State. A juror can not be heard to impeach the verdict returned into court, after its record. The principle succinctly stated in *Bishop v. State*, 9 Ga. 121 (4), that "the affidavit of a juror will not be received to impeach his verdict," has been reiterated too often to permit of space for citations.

6. It appears that the trial was free from error; and the evidence, as we have heretofore said, being sufficient to authorize a finding for the plaintiff, there was no error in refusing a new trial.

Judgment affirmed. Pottle, J., not presiding.

3244. GEORGIA SOUTHERN & FLORIDA RAILWAY CO. v. RANSOM.

RUSSELL, J. 1. The plaintiff, in her petition, asks for no damages other than vindictive damages; "the entire injury" (as alleged) "is to the peace, happiness and feelings of the plaintiff. The verdict of a jury in such a case should not be disturbed unless the court should suspect bias or prejudice from its excess or its inadequacy."

2. This is the third consecutive verdict for the plaintiff, upon testimony at each trial substantially identical (*Ga. So. & Fla. Ry. Co. v. Ransom*, 5 Ga. App. 540 (40 S. E. 525), 8 Ga. App. 277 (68 S. E. 943)); the instructions of the court to the jury in the instant case do not vary in any material particular from the charge heretofore approved by this court (5 Ga. App. 540, 63 S. E. 525), and this court having then ruled that a verdict for the same amount as that now under review (\$700) could not, as a matter of law, be held to be excessive, the assignment of error that the verdict was contrary to evidence is not sustained.

3. It is within the privilege of counsel, in reply to the contention of his adversary that the word "woman" could never be used as a term of reproach or contempt, to read a supposed newspaper item, illustrative of an opposite contention upon his part, or even to read, from notes used by him in the argument, the language of a news item sustaining his contention, where it does not appear that the newspaper item was exhibited to the jury, or that they were told that the illustration employed had ever existed in fact, and where it is perfectly plain that the instance related was used, and intended to be treated, merely as matter of illustration in argument.

Judgment affirmed. Pottle, J., not presiding.

DECIDED FEBRUARY 24, 1912.

Action for damages; from city court of Cordele—Judge Strozier.
January 14, 1911.

John I. Hall, J. E. Hall, J. T. Hill, for plaintiff in error.

F. G. Boatright, contra.

3259. SOUTHERN RAILWAY COMPANY v. CRABB.

- RUSSELL, J. 1. "The allowance rightfully to be made for indiscreet conduct under excitement and alarm can better be determined by the jury than by the court." *Smith v. Wrightsville & Tennille R. Co.*, 83 Ga. 671 (10 S. E. 361).
2. Whether the agents of a railroad company were negligent, or exercised extraordinary diligence, in the case of a passenger seeking to enter a train, as well as the comparative negligence of the passenger and the agents of the carrier in contributing to or preventing injury, is a question for determination by a jury; and the finding of the jury is not to be disturbed, if there is any reasonable inference, from the facts and circumstances in proof, which support the verdict.
 3. The duty of extraordinary diligence for the safety of passengers, which rests upon a carrier in behalf of a passenger who has purchased a ticket and is seeking to enter the train for the purpose of being transported to his destination, and whether extraordinary diligence requires that a passenger be assisted in entering a train, may be dependent upon the circumstances and conditions surrounding the passenger, the location of the tracks, the height of the steps or platform, and other facts of the particular case. If, in the exercise of extraordinary care, it should be necessary for the safety of a particular passenger, in an emergency, that the passenger be assisted in mounting the steps, or otherwise aided, in entering the train, then it would become the duty of the carrier to assist the passenger.
 4. The instruction of the court upon the subject of contributory negligence, when taken in connection with the entire charge, was a brief but clear presentation of the correct rules upon that subject as applied to the evidence in the case; being substantially similar to an instruction approved by the Supreme Court in *Southern Railway Co. v. Wallace*, 133 Ga. 553 (3), (66 S. E. 370, 30 L. R. A. (N. S.) 401).
 5. The assignments of error based upon the failure to charge upon contributory negligence in the language of the code do not authorize a reversal. The principles referred to in these assignments of error were presented to the jury, and if fuller instructions were desired, they should have been requested.
 6. The evidence authorized the verdict, and there was no error in refusing a new trial.

Judgment affirmed. Pottle, J., not presiding.

DECIDED FEBRUARY 24, 1912.

Action for damages; from city court of Polk county—Judge Irwin. February 18, 1911.

Trawick & Ault, John I. Tison, Maddox, McCamy & Shumate, for plaintiff in error.

I. F. Mundy, W. W. Mundy, contra.

3326. SCOTT, trustee, v. TURNER.

1. The application for mandamus nisi must be denied. The exact point is ruled in *Moore v. Reid*, 110 Ga. 248 (34 S. E. 211). The acceptance of the writ of error and its filing by the agent of the plaintiff in error can not be treated otherwise than if they had been his own acts. "After a judge has certified a bill of exceptions, and the plaintiff in error has, by serving and filing the same and by causing it and the specified portions of the record in the case to which it relates to be transmitted to the Supreme Court, accepted the certificate of the judge as sufficient, it is too late to apply to this court for a mandamus to compel the judge to certify further respecting such bill of exceptions. *Rogers v. Roberts*, 88 Ga. 150 [13 S. E. 962]. The above is true although counsel for the plaintiff in error may, before receiving from the judge the certified bill of exceptions, have orally expressed some dissatisfaction with the certificate and requested an addition thereto. The proper course in such case, if counsel regarded the certificate as incomplete, would have been to decline to receive and act upon it, and then apply to this court for a mandamus."
2. The recitals of fact as to the only assignment of error contained in the bill of exceptions not being certified to be true, and it appearing, on the contrary, that the statement of material facts in the bill of exceptions is denied by the trial judge, the writ of error must be dismissed.

DECIDED FEBRUARY 24, 1912.

Application for mandamus.

Phil W. Davis Jr., for petitioner. *R. W. Milner*, contra.

RUSSELL, J. The plaintiff in error presented to the judge of the lower court a bill of exceptions, in which it was stated that in the suit of Thomas E. Scott, trustee in bankruptcy of E. C. Taylor, against Arch Camp, in which a judgment was rendered against the defendant, Arch Camp, at the March term, 1910, of the city court of Covington, a summons of garnishment returnable to said November term of court had been served upon one N. S. Turner; that no answer to the garnishment had been made at the November term, 1910, or the January term, 1911, and that the plaintiff in fi. fa., after having introduced in evidence his judgment and the affidavit and bond for garnishment, the return of service showing that the garnishee had been duly served, the docket of the court, and all other papers in the case of file, and thereby having shown that the garnishee had filed no answer, asked for a judgment against the garnishee, which was refused, the court, on the contrary, having allowed the garnishee to file an answer. Exceptions pendente lite were filed to the ruling of the court in permitting the garnishee to file his answer, and exception was taken in the bill of

exceptions to the refusal to grant a judgment against the garnishee as in default. There was prepared and attached to the bill of exceptions, which was sent to the judge, the certificate prescribed by the Civil Code (1910), § 6145. However, the judge did not sign this certificate, but in lieu thereof prepared and signed the certificate following, which incorporated a contradiction of the facts related in the bill of exceptions, concerning the only material assignment of error: "I do certify that the foregoing bill of exceptions is true, subject to the following explanation: In the second exception upon the ruling of the court, found on page 2 of the bill of exceptions, I do not certify that the garnishment was returnable to the November term, 1910, of the city court of Covington. No evidence whatever was offered by the plaintiff showing to what term the summons of garnishment was returnable. The affidavit and bond for garnishment was dated October 22, the entry of service thereon was dated October 24. The case was docketed to the January term, 1911, and I ruled that inasmuch as there was nothing to show when the summons of garnishment was issued, and the service on Turner was dated October 24, and the November term of the city court began November 2, giving only eight days between the service of the summons of garnishment on Turner and the beginning of the November term, that the clerk had properly docketed the same to the January term, and that therefore the March term was the second term, and that he had a right to file his answer under the statute at the second term; this also upon the statement made by the plaintiff's counsel in open court to me, and to the opposing counsel, to the effect that if Turner did not owe the defendant anything, he did not want a judgment upon a technicality. I then allowed the answer and overruled the motion for a judgment. I further certify that this bill of exceptions specifies and contains all of the evidence and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the city court of Covington is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the present term of the Court of Appeals of Georgia, that the errors alleged to have been committed may be reviewed and corrected."

With the certificate in this form the bill of exceptions was filed

and served. More than thirty days had elapsed since the date of the judgment, and the bill of exceptions had been filed in this court, before counsel for the plaintiff in error discovered that the bill of exceptions had not been certified. Thereupon counsel for the plaintiff in error presented a petition for a mandamus nisi requiring the judge of the city court of Covington to show cause why he should not be required to certify the bill of exceptions.

1. The first question which arises is upon the petition for the mandamus. It appears, from the petition and the exhibit, that the counsel for the plaintiff in error sent his bill of exceptions by mail to the judge, and that as it was not returned to him until after several days had elapsed, and the time within which the bill of exceptions could be certified was about to expire, he wrote to the judge in regard to the matter. The judge replied the next day, stating that he had certified the bill of exceptions and turned it over to the clerk immediately after he had received it. The same day, counsel for the plaintiff in error addressed a letter to the clerk of the superior court, with a request that the clerk have the bill of exceptions served the next day without fail, and asking the clerk to see to it that the entry of service was made and signed by the sheriff. He enclosed copy of the bill of exceptions to be served upon Turner, and requested the clerk to fill in the date of the certificate, in the copy, before having it served. The bill of exceptions, as appears from the entries thereon, was filed March 23, 1911, and service was acknowledged by the attorney for the garnishee (the defendant in error here) on March 25, 1911.

We think that the act of the clerk in having the bill of exceptions filed and served must be treated as the act of the plaintiff in error himself. The bill of exceptions was not certified by the judge, and an examination of the judge's statement of facts and certificate would have disclosed that fact. It is very apparent that counsel for the plaintiff in error believed that the bill of exceptions, as prepared by him, had been certified. He had the right to believe this from the statement of the judge's letter to that effect, but it transpired that from the judge's statement he understood one thing, while the judge meant another. Acting upon his belief that the writ of error had been certified, he wrote to Mr. Davis, clerk of the superior court, to have it served by the sheriff. He thus constituted Mr. Davis his agent, and is bound by his acts. "After a

judge has certified a bill of exceptions, and the plaintiff in error has, by serving and filing the same and by causing it and the specified portions of the record in the case to which it relates to be transmitted to the Supreme Court, accepted the certificate of the judge as sufficient, it is too late to apply to this court for a mandamus to compel the judge to certify further respecting such bill of exceptions. *Rogers v. Roberts*, 88 Ga. 150 [13 S. E. 962]. The above is true although counsel for the plaintiff in error may, before receiving from the judge the certified bill of exceptions, have orally expressed some dissatisfaction with the certificate and requested an addition thereto. The proper course in such case, if counsel regarded the certificate as incomplete, would have been to decline to receive and act upon it, and then apply to this court for a mandamus." If what purports to be the certificate of the judge to the bill of exceptions be treated as a nullity, or the equivalent of a refusal to certify the bill of exceptions, as it must be, then the application for mandamus, under the ruling above cited, comes too late.

2. On the other hand, if the judge's note could be considered as a certificate (informal, it is true, but substantially sufficient to give this court jurisdiction), then no proceeding would be of any avail, because the judge could not be required to certify to facts and conditions related to have existed, when as a matter of fact such was not the case. It is plain that the only material assignment of error set forth in the bill of exceptions depends upon whether the summons of garnishment served upon Turner was returnable to the November term, 1910, of the city court of Covington. Under the facts stated by the judge, the averments of the bill of exceptions in this essential particular are fully contradicted. The recitals of fact as to the only assignment of error contained in the bill of exceptions not being certified to be true, it appearing on the contrary that the material statements of fact in the bill of exceptions are denied by the trial judge, the attempted writ of error must be dismissed.

Writ of error dismissed. Pottle, J., not presiding.

3333. ACME BREWING COMPANY v. RAHR SONS
COMPANY.

The contract was entire. There was no offer or attempt to return any of the malt, but on the contrary a deduction for deficiency in quality was accepted by the purchaser, and the malt put to his own use; consequently the purchaser estopped himself from rescinding the contract. The facts as stated by the pleadings are practically and substantially identical with those in *Henderson Elevator Co. v. North Georgia Milling Co.*, 126 Ga. 279 (55 S. E. 50), and the decision of the Supreme Court in that case is fully controlling; so there was no error in striking the defendant's answer, nor in thereafter entering judgment for the plaintiff.

DECIDED FEBRUARY 24, 1912.

Complaint; from city court of Macon—Judge Hodges. March 13, 1911.

Ellis & Jordan, for plaintiff in error.

Hardeman, Jones, Callaway & Johnston, contra.

RUSSELL, J. According to the allegations of the petition, the defendant entered into a contract by which it agreed to purchase 10,000 bushels of malt from the plaintiff, at \$1.05 per bushel, "f. o. b. Macon," which was to be ordered out by the defendant until all of it should be taken before October 1; and each shipment was to be paid for by the defendant within 30 days from the date of the shipment. The defendant ordered out, and the plaintiff shipped, at various times, in four shipments, about 8,000 bushels of the malt, and the defendant paid for it. The petition alleged that the plaintiff was willing and offered to deliver to the defendant the balance—about 2,000 bushels—not theretofore ordered out, and requested the defendant to accept it and pay the agreed price therefor, but it was alleged that the defendant would not accept the remainder of the malt, and that thereupon the plaintiff, after giving notice to the defendant, sold it at its market price, on the defendant's account. This suit was brought to recover the difference between the amount received from the sale of the undelivered portion of the malt contracted for and the contract price at which it had been sold to the defendant. Various letters and telegrams constituting the contract were set out in the petition and attached thereto. The defendant in its answer admitted the correspondence constituting the contract, and that it had agreed to accept the malt as alleged by the plaintiff, and had refused, when requested, to order out the last shipment, or to accept or pay for it. The an-

swer put the plaintiff upon proof of some of the allegations as to the sale of the malt on the defendant's account, but, as the matters dealt with in these portions of the petition are largely matters of calculation, and as no point is made upon this in the brief, the only real question turns upon whether the defendant's plea sets up any valid reason why the defendant should be relieved from the obligation of the contract admitted by it. The affirmative defense which the brewing company sought to interpose set up that out of an order of 10,000 bushels of malt, to be delivered between May and October, 7,979 bushels had been ordered out in several shipments, for which the defendant paid the plaintiff the contract price. Each of the shipments contained malt inferior in kind and quality to that contemplated by the contract, due to the presence of unreasonable quantities of trash and screenings in every shipment. Upon notification of this fact the plaintiff made allowances to the defendant on each of the several shipments, to cover the trash and screenings, which are fully set forth in an exhibit attached to the answer. The defendant notified the plaintiff several times prior to the time when the last shipment should have been ordered out that it refused to order forward any further shipments, for the reason that the plaintiff had failed to comply with its contract, in that the several shipments already made by it did not contain first-class screened malt, free from trash and screenings. The defendant pleaded that by reason of the several breaches of the contract by the plaintiff, the contract was abrogated. On demurrer the court struck the answer, and thereafter entered judgment against the defendant. Exception is taken to both of these rulings.

It will be seen, from the above statement, that there was no rejection of any of the malt actually shipped, nor any complaint of the quality of the malt, though the defendant claims deductions for a certain number of pounds of trash and screenings on each shipment, which were allowed by the plaintiff. As the finding for the plaintiff, after the striking of the defendant's answer was inevitable, and the exception to the action of the court in "rendering final judgment on pleadings from which the material defense of defendant, now and here plaintiff in error, had been stricken on demurrer," was sufficient, to comply with the ruling in *Lyndon v. Georgia Railway & Electric Co.*, 129 Ga. 353 (58 S. E. 1047), the only question presented to this court is the one presented by the

exception to the ruling upon the demurrer. In view of the admission of the defendant that the contract was made, and that four shipments were made under it, for which it paid the purchase-price, the main question was whether, under the facts stated, the defendant had rescinded or could rescind the contract. The facts in the present case are practically and substantially identical with those in *Henderson Elevator Co. v. North Georgia Milling Co.*, 126 Ga. 279 (55 S. E. 50), and the decision of the Supreme Court in that case properly controlled the judgment of the trial judge. Practically the only difference between the two cases is that the case cited concerned a shipment of corn, and not of malt, and the period within which the shipments were to be made was different from that in the case at bar. "Where there was a contract of sale of corn and a portion was delivered, paid for, and used by the purchaser, he can not rescind the contract upon the ground that the quantity received and accepted by him was inferior in quality to that stipulated in the contract." *Henderson Elevator Co. v. North Georgia Milling Co.*, supra. See, also, *Miller v. Moore*, 83 Ga. 684 (10 S. E. 360, 6 L. R. A. 374, 20 Am. St. R. 329); *Cohen v. Platt*, 69 N. Y. 348 (25 Am. R. 203).

The learned counsel for the plaintiff in error, in support of his contention that the delivery of inferior malt was a breach of the contract, and that the Acme Brewing Company was entitled to treat the breach as a discharge from further performance of the terms of the contract in every particular, cites the case of *Harden v. Lang*, 110 Ga. 394 (36 S. E. 100). It will readily be observed, however, that in the *Harden* case the principle is distinctly announced that when a breach is occasioned, and the purchaser desires to rescind the contract, he must not only notify the opposite party, but he must return the articles he has received, and Judge Little, in delivering the opinion, says: "When, after such breach, he not only retains the articles received, but puts them to his own use and notifies the seller he has purchased elsewhere the part of the machinery contracted for but not delivered, this is equivalent to an election to abide by the terms of the contract, and he thereafter holds under those terms the articles received." This principle is adverted to in the *Henderson Elevator Company* case, supra. In that case the defendant had used the corn. The defendant in the present case used the malt. It could not return it. It did not offer

to do so; and, as was said by Judge Bleckley in *Summerall v. Graham*, 62 Ga. 729: "Restitution before absolution is as sound in law as in theology." The plaintiff in error relied also upon the decisions of this court in *Gude v. Bailey Co.*, 4 Ga. App. 230 (61 S. E. 135), and *Cincinnati Glass Co. v. Stephens*, 3 Ga. App. 766-768 (60 S. E. 360). Neither of these cases is in point. The facts in each case clearly distinguish it from the case at bar, and in each case the ruling turns largely upon the fact that the facts were such as to authorize the inference that there was a novation. There was no error in sustaining the demurrer and striking the defendant's plea.

Judgment affirmed. Pottle, J., not presiding.

3393. KNOWLES v. DAYRIES RICE CO.

1. The argument of counsel, being based upon an inference unsupported by evidence and irrelevant to the merits of the cause, was presumably prejudicial to a fair consideration by the jury of the rights of the opposite party, and, the latter's counsel having properly objected thereto and moved for a mistrial, it was error not to grant a mistrial.
2. Otherwise than as above stated, the trial was free from error.

DECIDED FEBRUARY 24, 1912.

Appeal; from Muscogee superior court—Judge Gilbert. March 20, 1911

Chapman & Howard, for plaintiff in error.

C. E. Battle, Howell Hollis, contra.

RUSSELL, J. Upon an examination of the record in this case we were first inclined to affirm the judgment refusing a new trial, but upon more mature reflection we are satisfied that the argument of the distinguished counsel for the plaintiff in the court below must necessarily have prejudiced the rights of the defendant, and probably deprived him of his right of an absolutely fair and impartial trial, had, as all trials should be had, upon the law and the evidence, and nothing else. The right to an absolutely fair and impartial trial is guaranteed every party in every cause, and the highest duty of a court is to see that this right is preserved absolutely unimpaired. The importance of the principle is likely to be overlooked when the cause is a civil case and only a small amount is involved, but the paramount importance of this right should never be overlooked, and, when the power of the court is properly in-

voked for its protection and preservation, the appeal should in no case be disregarded. Retribution upon any party offending should be speedy and unsparing. As was said in *Parker v. State*, 3 Ga. App. 23 (59 S. E. 205): "It is with the greatest reluctance and with the gravest sense of responsibility that a court of review will control the conduct of a trial judge in the administration and exercise of the high duties which devolve upon him." Counsel, too, in the discharge of his duties to his client, standing as he does in his client's shoes to plead his cause, should be allowed the utmost freedom of speech and action consistent with the rules of orderly judicial procedure; yet in any case in which the attorney for one party does any unwarranted act which prejudices the right of the opposite party to have the jury accord exactly impartial consideration of his contentions as deducible from the evidence in the case, or when the attorney for either party argues before the jury matters foreign to the issue and unsupported by the evidence, which are prejudicial to the opposite party, the duty devolves upon the court of dealing summarily with the matter, if it is properly called to the judge's attention. This rule is essential to the end that exact justice shall be administered.

In the present case, which only involves a small amount, the judge certifies that the plaintiff's attorney argued in conclusion that the defendants had collected insurance money from insurance companies on all the stock of merchandise of the defendant, including the rice in controversy. The defendant's attorney objected in open court to this argument, and the judge stated to the jury that such argument was improper, and that the jury should not consider it. After this ruling and instruction the plaintiff's counsel stated to the court that he was arguing this fact only as an inference to be drawn from the testimony in the case; to which the court replied, in substance, that it would not be proper to argue any fact not brought out by the testimony, but any fair inference counsel drew from the testimony might be stated as an inference only. Thereupon counsel for the plaintiff continued to argue that it was a fair inference to be drawn from the testimony in the case that the defendant had collected on all his stock of merchandise, and on all this rice, which had been destroyed in the store. Counsel for the defendant again objected to the argument, and urged that it was unfair and prejudicial to the defendant, and without any evidence

to support it, and thereupon moved the court to declare a mistrial. The court overruled the motion to grant a mistrial, and error is assigned upon this ruling.

We think a review of the record sustains the contention that the failure of the court to declare a mistrial, under the circumstances, had the effect of denying to the defendant a fair and impartial trial upon the issues involved in the case; that the argument was calculated to prejudice the jurors' minds against the defendant, because it was unfair and had no connection with the true issues in the case. The only issues, under the evidence, were whether the rice ordered by the defendant was shipped to him by the plaintiff, and, if so, whether the fact that the rice was received by the defendant from the carrier sufficed to constitute such an acceptance of the shipment as would remove the sale from the operation of the statute of frauds, the value of the rice being more than \$50. "Mere receipt of goods without acceptance will not meet the requirements of the statute of frauds." *Wholesale Mercantile Co. v. Jackson*, 2 Ga. App. 782 (3), (59 S. E. 109); *Loyd v. Wight*, 20 Ga. 578 (65 Am. D. 636); s. c. 25 Ga. 215; *Tiedeman on Sales*, § 66. If there had been any evidence to the effect that the defendant collected insurance upon the rice, or any evidence that the rice was specifically considered by either party when the loss by fire was adjusted, the inference that the defendant had accepted the rice and treated it as his own would have been authorized. We do not find anything in the defendant's letter to the plaintiff, however, which authorized such an inference. Nothing to that effect was elicited from Knowles on cross-examination, and no direct or circumstantial evidence to that effect appeared in the record from any source.

For this reason we think there was nothing to suggest the inference which counsel for the plaintiff sought to argue, except mere conjecture. There could at most be but a suspicion that Knowles might have been paid for the rice, due to the fact that it was in his store at the time of the fire; but this would not authorize the inference that he had received pay for it, in the absence of any evidence as to the time when his insurance was taken out, the amount of insurance upon the stock, and the value of his stock of goods at the time the contract of insurance was entered into and at the time of the fire. If, as we think, the inference was unauthorized, it was

naturally very prejudicial to the defendant, because it would place him in the attitude of refusing to pay for goods for which he himself had been paid. Nothing more strongly prejudices an honest jury against the litigant than evidence of his dishonesty. Nothing in our experience can more strongly tend to influence a fair jury (perhaps unconsciously to themselves) against a contention otherwise unanswerable than circumstances which strongly suggest the fact that the contention is not fairly presented. The amount involved in this case was small. As suggested by the remarks of Justice Lamar, in discussing a similar situation (*Patton v. State*, 117 Ga. 238-239, 43 S. E. 533), the defendant's counsel in the instant case took a great risk in objecting to the argument at all, because juries are so much in favor of the right of free speech that the objection might suggest to the jury that he was of the opinion that the plaintiff's counsel was puncturing an unusually vulnerable point in the defendant's defense, and that if the plaintiff's counsel had been permitted to develop the whole truth, unobstructed by a legal technicality, more of the true merits of the transaction might have been disclosed to their view. The court properly sustained the objection of the defendant's counsel, but practically withdrew the ruling and magnified the injurious effect of the argument when he later permitted plaintiff's counsel to argue, as a legitimate inference from circumstances proved in the case, the same thing to which objection had been offered as not being a matter of direct proof. We think the court erred in the latter ruling, for unless the inference indulged can be reasonably drawn from facts and circumstances in a given case, it can not arise at all and does not exist. There must be a plain connection between the facts in proof and the inference drawn therefrom. If the inference in question is not manifestly supported by, and reasonably deducible from, the facts in proof, the argument is irrelevant, and, ordinarily, prejudicial.

Otherwise than as above stated, the trial was free from error.

Judgment reversed. Pottle, J., not presiding.

3403. SLACK *v.* ELKINS, administrator.

RUSSELL, J. 1. Under the facts stated in the defendant's motion, it was error to refuse, at the trial term, to allow the default to be opened. The defendant had paid the costs, the showing under oath set up a meritorious defense, and the movant offered to plead instantter, and announced ready to proceed with the trial.

2. Generally the holder of a promissory note, pledged to him as collateral, may enforce it for the entire amount against the maker as obligor; holding, as trustee for the pledgor, any surplus after the payment of his debt; but if the maker has a valid defense against the original payee, the holder can not recover more than the amount of the debt due him by the payee as his pledgor. If the maker of a promissory note which has been pledged to a third person as collateral security proves a defense not available as a bar to recovery by the pledgee, but good as against the pledgor, the pledgee will be allowed to recover only to the amount of the debt for which he holds the collateral security.

3. In a case in which A. gives his promissory note to B., and deposits with B. a promissory note of C. to himself as collateral security; and B. sues C. upon the collateral note, and A. thereafter, before the trial term, pays in part his original obligation to B., and C. on his part has paid to A. either the whole or a part of the amount of the note held by B. as collateral, B. is not entitled to recover, in his action against C., a sum larger than the amount of the unpaid balance due him by A. at the date of the judgment.

4. Where the contract for attorney's fees contemplates that it shall be fixed upon a percentage basis, the amount due as attorney's fees is determined with reference to the amount actually due upon the obligation at the time of the trial, and not by the amount alleged to be due when the suit was filed.

Judgment reversed. Pottle, J., not presiding.

DECIDED FEBRUARY 24, 1912.

Complaint; from city court of Tifton—Judge R. Eve. March 16, 1911.

J. B. Murrow, J. J. Murray, for plaintiff in error.

George E. Simpson, W. H. Horne, O. H. Elkins, contra.

3416. MOON *v.* CITY OF JEFFERSON.
3457. APPLEBY *v.* CITY OF JEFFERSON.
3458. DUKE *v.* CITY OF JEFFERSON.
3459. PHILLIPS *v.* CITY OF JEFFERSON.

The filing of a bond conditioned for the personal appearance of the defendant to abide the final order, judgment, or sentence of the municipal court, or of the superior court, or the filing of a proper affidavit in forma pauperis in lieu of a bond, is a condition precedent to obtaining a writ of certiorari in a case where one seeks to review the judgment of a municipal court. The bond must be approved by the clerk of the municipality under which the court exists, if there be one, and it must be conditioned for the appearance of the defendant to abide the final judgment of the superior court, as well as of the mayor's court, and a defect in either respect is fatal. Consequently it is not error for a judge of the superior court to refuse to sanction a petition for certiorari when it appears, from an inspection of the bond tendered, and attached to the petition, that it is neither conditioned as required by law, nor approved by the municipal officer charged by law with the duty of approving it.

DECIDED FEBRUARY 24, 1912.

Certiorari; from Jackson superior court—Judge Brand. March 23, 1911.

Ray & Ray, Mahaffey & Mahaffey, for plaintiffs in error.

C. L. Bryson, contra.

RUSSELL, J. We are precluded from a consideration of the merit of the attacks upon the constitutionality of the ordinance of the City of Jefferson, sought to be made in the petitions for certiorari in these cases. The trial judge, for the same reason, could not consider them. It appears, from an inspection of the petition for certiorari, and the exhibits referred to thereby, including the bond itself, that the bond was approved in one case by the mayor, and in the others by the acting mayor of the City of Jefferson, when they should have been approved by the clerk of the city council. It also appears in the case of Anse Moon that the petitioner only binds himself to appear before the mayor, if the certiorari is decided finally in favor of the City of Jefferson, and pay the fine or serve the sentence. In the other three cases the condition of the bond is that it shall be void if the principal in the obligation abides and answers the final judgment in said case, whatever it may be. It is therefore plain that the judge of the superior court did not err in refusing to sanction all of these petitions. As held by the Supreme Court in *Johns v. Tifton*, 122 Ga. 734 (50 S. E. 941),

"The filing of the bond or making of the pauper affidavit is a condition precedent to the application for certiorari." Both the Supreme Court and this court have frequently defined the requisites of the bond in cases of certiorari from judgments of municipal courts. In the *Johns* case, *supra*, it was held that "a bond conditioned to pay the eventual condemnation-money is not such a bond as the statute prescribes; and the trial judge did not err in refusing to sanction the application." In *McDonald v. Ludowici*, 3 *Ga. App.* 654 (60 S. E. 337), this court held that a certiorari could properly be dismissed either where the bond was not approved by the proper officer of the municipality, or where it was not conditioned to abide by the judgment of the superior court, or the mayor's court. This ruling has been followed without exception, because we have deemed the act of 1902 (Acts 1902, p. 105) mandatory, and have considered the matter of perhaps even more importance since the passage of the act of 1909 (Civil Code of 1910, §§ 5192-4), which provides for the supersedeas of the judgment upon the filing of the bond. Upon the proposition that the certiorari should not be sanctioned, or, if sanctioned, should be dismissed, where it appears that the bond was not approved by the proper municipal officer, see *Condon v. Jesup*, 5 *Ga. App.* 100 (62 S. E. 677). Upon the proposition that the certiorari bond must be conditioned strictly as provided by law, we pointed out, in *McDonald v. Ludowici*, *supra*, the apparent reason for the legislative requirements for the appearance of the defendant to abide the final order or judgment of the superior court, as well as of the police or mayor's court; and this ruling was followed in *Simon v. Savannah*, 4 *Ga. App.* 172 (60 S. E. 1036); *Poulos v. Atlanta*, 4 *Ga. App.* 567 (61 S. E. 1128); *Tooke v. Oglethorpe*, 4 *Ga. App.* 851 (62 S. E. 544); *Roach v. Atlanta*, 7 *Ga. App.* 171 (66 S. E. 484).

Judgment affirmed. Pottle, J., not presiding.

3418. FLINT RIVER & NORTHEASTERN RAILROAD CO.
v. MAPLES et al.

1. Reasonable certainty as to essential statements is sufficient to enable pleadings to withstand a special demurrer. Complete particularity of statement is not required where a reasonable inference, from the statements made, readily suggests the facts.

- (a) In an action against a railroad company for damages due to negligently setting out fire, the manner in which the fire was set out must be alleged, but, from the very nature of the case, it is not always within the power of the plaintiff to state the particular agent, servant, or employee who actually started the fire; and the omission on the part of the plaintiff to specify the particular employee to whose negligence the injury was traceable will not subject the petition to special demurrer.
2. While the best method of proving that no administration was ever had upon a particular estate is to introduce the evidence of the ordinary, or of another who has examined the records in the proper court of ordinary, that no letters of administration upon the estate are shown by those records, still, where a witness testifies to the effect that no administration has ever been granted upon the estate of a named person, and no objection is interposed at the time the testimony is offered, it will be assumed that the witness has made the requisite examination of the records, and testifies from knowledge derived therefrom; for "unless it affirmatively appears that evidence is hearsay, it is not to be excluded as such, where it is of a nature which admits of its resting on the personal knowledge of the witness."
 3. When there is no administration nor any necessity for administration, realty descends to the heirs at law. The evidence in the present case was sufficient to show that the intestate died before the time of the fire which was alleged to be the cause of the injury and damage.
 4. The verdict was authorized by the evidence. There was no error in the ruling upon the testimony complained of, nor in the charge of the court to which exception is taken.

DECIDED FEBRUARY 24, 1912.

Action for damages; from city court of Camilla—Judge Bennet.
April 1, 1911.

J. J. Hill, Shipp & Kline, for plaintiff in error.

E. M. Davis, contra.

RUSSELL, J. Maples and others brought suit against the railroad company for damages, alleging that the defendant had set out fire, as the result of which the plaintiffs had been damaged in the sum of \$490, which was specified as follows: 200 timber trees burned, \$200; 760 yards of rail fence, \$70; 25 or 30 acres of cane brake, \$200, and 2,000 rails burned, \$20. The defendant demurred generally and specially to the petition. The court overruled the demurrer, and exceptions pendente lite were filed. On the trial a verdict for \$429 was returned in favor of the plaintiffs. The case is brought to this court upon assignments of error on the exceptions pendente lite, and also upon the refusal of a motion for new trial. From evidence in behalf of the plaintiff the jury were authorized to infer that the fire was caused by the burning of certain cross-ties by the section foreman, perhaps in pursuance of

instructions from his superiors. The right of the plaintiffs to maintain the action, and the amount of the recovery, were fully sustained by the testimony.

1. The court was so clearly right in overruling the general demurrer as to preclude any necessity for discussion upon that subject. The petitioners alleged, that they were the sole heirs of Mrs. Margarette J. Maples, deceased, late of said (Mitchell) county, and, as such, were the owners and in possession of two described tracts of land, located in the county and adjoining the defendant's railroad; that the defendant permitted combustible material, such as wiregrass and undergrowth, which had become seared and dry, to remain upon the right of way of the said railroad, contiguous to and adjoining the petitioners' land, and, through its servants, had piled old cross-ties along the right of way, and set fire to these piles of cross-ties at a time when a high wind was blowing in the direction of the petitioners' land and property, which spread to their land, and, in spite of every effort upon their part to check the flames, destroyed the property to which we have above referred.

The amendment alleging possession, which was offered in response to the demurrer, cured the only material defect in the petition. The title to the land was only incidentally involved, for the city court of Camilla had no jurisdiction to determine the title to the land. "The bare possession of land authorizes the possessor to recover damages from any person who wrongfully, in any manner, interferes with such possession." Civil Code (1910), § 4472; *Southern Ry. Co. v. Thompson*, 129 Ga. 367 (9), (58 S. E. 1044); *Downing v. Anderson*, 126 Ga. 373 (55 S. E. 184). From the brief of the plaintiff in error it appears that the only ground of the special demurrer really insisted upon in this court is the one in which it is contended that the plaintiffs did not put the defendant on notice as to how the fire originated,—whether from the defendant's voluntarily putting out fire, or whether the fire caught from defendant's locomotive; and it is insisted that the effect of overruling the demurrer to this particular part of the petition was perhaps to permit the plaintiffs to prove that the fire was put out by the defendant in either of these ways, or to prove that the defendant by any other means fired the plaintiffs' woods and cane-brake. Complete particularity of statement is not required where, from the

statements made, the facts sought to be alleged may easily be deduced. As was said by Judge Powell, in *Atlantic Coast Line R. Co. v. Davis*, 5 Ga. App. 214 (62 S. E. 1022), "reasonable certainty is all that is required to render pleadings exempt from attack by special demurrer." The plaintiff in error, no doubt, formed the impression that the allegation of the declaration was susceptible of two interpretations, from the introduction of certain testimony in regard to the passage of other trains of the defendant, to which we will refer later in this opinion. The petition distinctly alleges, in its seventh paragraph, that "on said date hereinbefore mentioned the defendant, through its agents, servants, and employees, negligently set fire to said piles of cross-ties at a time when a high wind was blowing in the direction of petitioners' land and fence, . . . which said fire spread . . . to the lands of petitioners," etc. This sufficiently charges the manner in which the fire was set out by the defendant, and compelled the plaintiffs to prove that the fire originated in the manner specified. Another ground of the demurrer raises the objection that the petition did not set out the names of the agents or employees of the company who set out the fire. Such a requirement as this would be so unreasonable as to debar most plaintiffs, damaged by fire set out by a railroad company, from any recovery at all; because, whether the fire originated from the employment of defective instrumentalities in the boiler, or from the act of section hands, the plaintiff, in either event, might not be able to ascertain the name of the particular servant of the company whose negligence caused the damage. In an action brought against a railway company for damages due to negligently setting out fire, the manner in which the fire was set out must be alleged; but, from the very nature of the case, it is not always within the power of the plaintiff to state the particular agent, servant, or employee of the railroad company who actually started the fire, and the omission on the part of the plaintiff to specify the particular employee to whose negligence the injury was traceable will not subject the petition to special demurrer.

2. In the motion for a new trial it is insisted that there was no competent evidence going to show that there was not an administrator appointed on the estate of Mrs. Margarette J. Maples; for the reason that no one testified to having examined the records of the court of ordinary to ascertain whether there was an adminis-

trator on the estate or not. Counsel for the plaintiff in error cites the ruling in *Compton v. Fender*, 132 Ga. 483 (64 S. E. 475). In the present case it appears, from the petition and the proof, that the plaintiffs were the only heirs at law of Mrs. Maples. Her husband testified that there was no administration. No objection was offered to the testimony at the time. It was not sought to show, by means of a cross-examination, that the testimony was hearsay. No objection having been offered to the testimony at the time, it must be assumed that any objection to the testimony, dependent upon the fact that it was not the best method of proof, was waived. While it is true, as ruled in the *Compton* case, *supra*, that the best method of proof that no administration was ever had upon a particular estate is to introduce the evidence of the ordinary, or of some other person who examined the record, and who will testify that no such letters of administration were ever granted, as shown by the record, still it was ruled in *Atlanta Glass Co. v. Noizet*, 88 Ga. 43 (13 S. E. 833), that "unless it affirmatively appears that evidence is hearsay, it is not to be excluded as such, where it is of a nature which admits of its resting on the personal knowledge of the witness." There was no objection offered to the testimony of the witness in the present case, and, upon the reasoning in *Atlanta Glass Co. v. Noizet*, *supra*, it must be assumed that the witness who stated that there was no administration had made an examination of the records in the court of ordinary of Mitchell county, and that his testimony was based upon knowledge derived by him from this examination.

3. In the motion for a new trial it is insisted that there was no testimony to show whether Mrs. Margarette J. Maples died before or after the alleged fire. This exception is wholly without merit, because the undisputed testimony shows that Mrs. Maples had been dead about four or five years before the fire. Jurors can make calculations as well as other people, and any juror of ordinary intelligence could as easily ascertain approximately when Mrs. Maples died, from the testimony in this case, as if a witness had stated that she died in some year named by him. The evidence of I. Maples was not controverted by any testimony in the case. He testified that she went into possession of the land "about seventeen years ago," and she had been in possession, under the deeds exhibited by him, between twelve and thirteen years up to the time

of her death. If Mrs. Maples went into possession seventeen years prior to the time the witness was testifying and was in possession thirteen years before she died, it is easy to see that she had been dead four years at the time the witness was testifying in February, 1911, and therefore must have been dead approximately two years in October, 1909, the time of the fire. If the witness's wife had only been in possession twelve years at the time of her death, then the fire was approximately three years subsequent to her death. By any reasonable deduction from the testimony upon the subject of the wife's possession the conclusion is certain that Mrs. Maples died before the fire occurred, and it being sufficiently proved, as we have heretofore shown, that there was no administration upon her estate, her realty descended to her heirs at law.

4. In the remaining grounds of the motion for new trial, the insistence is presented, (a) that the heirs at law could not recover for the 2,000 rails alleged to have been damaged, the rails being personal property; (b) that the judge erred in assuming, in his charge to the jury, that the railroad company did in fact pile cross-ties on the side of the track; and (c) that the court erred in admitting, over objection, the following testimony: "The engine had been there 15 or 20 minutes. I never saw a train set woods on fire." None of these assignments of error appear meritorious.

(a) As to the rails: It does not affirmatively appear that the plaintiff recovered the full value of the rails, or that the rails were included in the verdict in favor of the plaintiff. The allegations as to the amount of each item of damage were sustained by proof, yet the verdict was only for \$429.22, instead of for \$490, the total amount alleged. If the jury merely found for the plaintiffs the value of the 200 trees and the cane-brake, amounting to \$400, and then included in their verdict seven per cent. interest as a part of the damages, the amount would have been a little larger than the verdict. Such a finding would have excluded both the \$20 worth of rails and the fencing around the pasture, as to the destruction and value of which there was no dispute. But no objection seems to have been offered to the evidence upon the subject of the rails. The judge in his charge did not refer to the rails, and no motion was made to strike from the plaintiff's petition the items claiming damages upon that score. Furthermore, even if the verdict included the rails, the testimony in behalf of the plaintiffs is perfectly sustained

upon the theory that the rails were cut subsequently to the death of Mrs. Maples, and therefore were the property of the plaintiffs in their own right, for the destruction of which they could recover.

(b) The seventh ground of the motion for new trial assigns error upon the following language of the charge of the court: "The next question you will have to decide is whether or not the railroad company exercised due diligence in piling cross-ties on the side of the track." It was testified for the plaintiffs that there were cross-ties piled along the right of way at the time of the fire. It was not denied by the witness for the defendant that there had at some time and at various times been cross-ties piled along the right of way. He did say that they had been burned on a certain portion of the right of way before the fire. It might appear that this statement of the court, while it was obviously harmless, would afford ground for new trial, if it was not apparent that the court immediately corrected the error and made it plain that there was no intention upon his part to express any opinion whatever as to the evidence, or even to intimate that cross-ties had been left piled upon the right of way. From what followed it is plain that the language employed was a mere lapsus linguæ. The court had stated only one additional issue, and had uttered only a few words, when, his attention having been directed to the slip of the tongue, he charged the jury as follows: "My attention has been called to the fact by Mr. Davis that I said that the cross-ties were piled in the manner alleged. That is the allegation that they make. You look to the evidence to see, in reference to that, gentlemen of the jury, whether or not the railroad company has exercised ordinary diligence."

(c) Error is assigned because the court permitted a witness to testify that "the engine had been there 15 or 20 minutes. I never saw a train set woods on fire." The objection made to this evidence was that the petition did not allege that the fire originated from an engine, and therefore the defendant had no notice at all that it would be claimed that the fire originated from an engine. If the objection had been made that this testimony was irrelevant because the petition charged that the fire was set out by the burning of piles of cross-ties, the evidence would still have been admissible, because it is apparent, from the context of the witness's testimony, that his statement in regard to the engine was elicited merely to

fix the time when he saw the fire; and, from his statement that he never saw a train set woods on fire, we are unable to draw the conclusion that his testimony tended to show an effort on the part of the plaintiffs to establish the fact that the fire, in the present case, was caused by sparks or fire from the engine. So far as the proof is concerned, the only difficulty which presents itself is in determining whether the testimony is sufficient to have authorized the inference that the fire and consequent damage were caused by the setting of fire to piles of cross-ties by agents or servants of the defendant railroad company. After a careful review of the evidence (and especially in view of the testimony in behalf of the plaintiffs as to the statement of the section foreman that he was going to burn piles of cross-ties, which these witnesses say were on the right of way) we are of the opinion that the jury were authorized to find that the fire was set out by an employee of the defendant in the manner alleged in the petition.

Judgment affirmed. Pottle, J., not presiding.

3470. COOK v. THE STATE.

- HILL, C. J. 1. An indictment having been duly transferred by the superior court of the county having jurisdiction of it to the city court for trial, jurisdiction of the case was immediately vested in the city court, and the superior court had no further jurisdiction over the indictment. *Coleman v. State*, 94 Ga. 87 (21 S. E. 124).
2. The act of the General Assembly, approved August 15, 1910 (Acts 1910, p. 201), entitled "An act to abolish the city court of Newton, to provide for the disposition of business pending in said court, and for other purposes," having been held by the Supreme Court to be "nugatory and ineffectual" (*Cook v. State*, 137 Ga. 486, 73 S. E. 672), it follows that the city court of Newton retained jurisdiction of all criminal cases which the superior court of Baker county had duly transferred to it for trial, irrespective of the provisions of that act.
3. The indictment against the plaintiff in error having been duly transferred by the superior court of Baker county to the city court of Newton for trial, the former court lost jurisdiction of the case, and the latter court was vested with exclusive jurisdiction thereof. Under the provisions of the act of 1910, supra, which attempted to abolish the city court of Newton and to provide for the disposition of business pending in that court, the indictment was transferred back to the superior court of Baker county for trial. Since the act abolishing the city court of Newton was ineffectual for that purpose, as declared by the Supreme Court in the present case, the transfer of the indictment back to the

superior court under the provisions of that act was unauthorized, and did not confer upon the superior court jurisdiction of the case which it had previously fully relinquished to the city court; and, therefore, the superior court was without jurisdiction to try the case, and a plea in abatement filed in the superior court, challenging the jurisdiction of the court, should have been sustained and the case sent back by the superior court to the city court, for trial.

Judgment reversed. Pottle, J., not presiding.

DECIDED FEBRUARY 26, 1912.

Indictment for disturbing divine worship; from Baker superior court—Judge Frank Park. May 8, 1911.

W. I. Geer, for plaintiff in error.

W. E. Wooten, solicitor-general, *F. A. Hooper*, contra.

3509. *McFARLIN et al. v. REEVES.*

RUSSELL, J. 1. There was no motion to dismiss the levy of the mortgage *fi. fa.* upon the ground that the justice of the peace had not notified the mortgagor at the time of issuing the execution upon the affidavit of foreclosure, and, in the absence of an appropriate request, the judge did not err in failing to charge the jury that it was the duty of the magistrate, with whom the mortgage and affidavit to foreclose it were filed, to give notice to the mortgagor of the proceedings to foreclose, at the time of issuing the execution, and that if the proof showed that he failed to do this, the jury should find for the plaintiff. Nor did the court err in overruling the objection to the mortgage *fi. fa.*, based upon the ground that it did not show that the justice of the peace had given notice to the defendant in *fi. fa.* as required by law.

2. It is optional to take either the exemption provided by § 3416, or the exemption declared in § 3414, of the Civil Code (1910), but one can not take both the exemptions. Civil Code (1910), § 6585.

3. The evidence authorized the verdict, and there was no error in refusing a new trial.

Judgment affirmed. Pottle, J., not presiding.

DECIDED FEBRUARY 26, 1912.

Appeal; from Upson superior court—Judge R. T. Daniel. May 19, 1911.

James R. Davis, for plaintiffs in error.

J. Y. Allen, *M. H. Sandwich*, contra.

3249, 3250. ROSENHEIM SHOE CO. *v.* HORNE *et al.*,
and *vice versa*.

1. The motion to dismiss the bill of exceptions, on the ground that it does not disclose with sufficient certainty who are the parties to it, is not well taken.
2. The liability which, under the Civil Code (1910), § 2220, attaches to the organizers of a corporation, for beginning to do business before the minimum capital stock is subscribed for, attaches in favor of creditors, and not in favor of the corporation itself. It is a liability which a trustee in bankruptcy of the corporation can not legally enforce; hence, the pendency of a suit by a trustee in bankruptcy on this alleged cause of action does not afford ground of abatement as to a suit filed by a creditor in his own behalf.
3. Prior to the formal and complete organization of a corporation, the organizers of it may make provisional contracts in behalf of the corporation, which may become binding on the corporation after it begins business; but in the meantime, and until the corporation is legally organized, the promoters are liable as partners. The law does not require that the minimum capital stock, as stated in the charter, shall be fully subscribed for until formal organization and till the corporation, as such, begins to do business. Hence, one dealing with the persons who have obtained a charter for a corporation, but who have not formally completed organization thereunder may, though he has knowledge, at the time he contracts, that the capital stock has not been subscribed for, hold the organizers liable as partners when they afterwards go forward and commence business as a corporation without requiring the capital stock to be subscribed; it not appearing that he knew that the persons with whom he dealt did not intend to obey the law in this respect.
4. Where the application for charter and the charter of the corporation name only one sum as the proposed capital of the corporation, that sum is the "minimum capital stock" which the Civil Code (1910), § 2220, requires to be subscribed for in order to relieve the organizers of the corporation from individual liability to creditors.

DECIDED JANUARY 15, 1912. REHEARING DENIED FEBRUARY 27, 1912.

Complaint; from city court of Eastman—Judge Griffin. January 19, 1911.

The plaintiffs sold goods to the manager of a corporation in process of organization. The capital stock of the corporation was stated in the application for charter and in the charter itself as \$20,000. The full capital stock was never subscribed or paid in; indeed, only 10 per cent.—that is, \$2,000—was ever subscribed or paid in. The corporation became bankrupt without having paid the plaintiffs' bill in full. The trustee in bankruptcy and the plaintiff company each separately sued the promoters of the corporation to enforce the liability declared by the Civil Code (1910),

§ 2220, as follows: "Persons who organize a company and transact business in its name, before the minimum capital stock has been subscribed for, are liable to creditors to make good the minimum capital stock with interest." The suit by the trustee in bankruptcy is involved in the present case only to the extent that its pendency was set up by the defendants as a plea in abatement to the present action.

The facts of the transaction are practically undisputed. The principal reason asserted by the defendants why the plaintiffs should not hold them liable is that the plaintiffs knew, at the time they extended the credit, that the full capital stock had not been subscribed. The proof as to this element of the case comes from the plaintiffs' credit man. He testified, in substance, that when he passed on the order for the goods, he had before him reports from the commercial agencies stating that the corporation was in process of organization, that only \$2,000 had been subscribed for and paid in at that time. He further stated in his testimony that he did not understand or believe that only this sum was to be subscribed for and paid in, and the commercial reports did not so state. His understanding was that the organization was not complete, that it would be completed by the full capital stock being subscribed, and that it would be paid in as needed. The court granted nonsuit on the ground that this knowledge as to the capital stock not being subscribed for prevented the plaintiffs from recovering. To this judgment, as well as to a number of other rulings, the plaintiffs excepted. The defendants filed a cross-bill of exceptions.

Hardeman, Jones, Callaway & Johnston, for plaintiffs.

W. M. Clements, W. L. & Warren Grice, for defendants.

POWELL, J. (After stating the foregoing facts.)

1. The defendants moved to dismiss the bill of exceptions because it does not definitely disclose who are parties to it. It recites that it is filed in a case of Joseph Rosenheim Shoe Company against certain persons and a corporation, naming them, and that to the final judgment the plaintiff excepts and tenders the bill of exceptions. These recitals are consistent with the record. The motion to dismiss is overruled. *Joiner v. Singletary*, 106 Ga. 257 (32 S. E. 90).

2. As to whether the present suit was subject to abatement because of the pendency of the prior suit instituted by the trustee in

bankruptcy of the corporation on the same alleged cause of action: The right of action declared by the Civil Code (1910), § 2220, is given to the creditors, and not to the corporation, or to any one standing as its representative or successor in title. In *Walters v. Porter*, 3 Ga. App. 73 (59 S. E. 452), this court allowed the receiver appointed in an equitable action against the corporation to maintain a similar action with the consent of and under the direction of the court of his appointment. That decision was based on the theory that the receiver, under all the circumstances of the case, not only was clothed with such right to sue as formerly resided in the corporation, but also represented the creditors and was authorized to sue in their behalf. It was on this second fact, the fact that he had been vested with the right of action normally residing in the creditors, and not the fact that he was also the representative of the corporation, that this court recognized the receiver's right to bring suit to enforce the liability against the promoters of the corporation. A trustee in bankruptcy, upon his appointment and qualification, succeeds (except in so far as it is otherwise specially provided) to the title to all property of the bankrupt, and becomes authorized to sue and recover, in most cases, where, but for the intervention of the bankruptcy proceedings, the bankrupt could have sued. Still, such title and such authority to sue as the trustee in bankruptcy possesses is only that conferred by the act of Congress. He is, in a sense, a representative of the creditors and of the bankrupt, but is a special, and not a general representative. The extent and limits of his title as to property and as to causes of action are prescribed in § 70 of the bankruptcy act. Neither this nor any other portion of the act transfers to him causes of action accruing personally to the creditors. It is true that by the amendment of June 25, 1910 (31 St. at Large, ch. 412), the trustee is vested with the same rights as if he were a judgment creditor; but this, as plainly appears from the context, is intended to apply only to cases in which the trustee is suing to recover assets belonging, in law or in equity, to the bankrupt estate, or is defending against the claims of others seeking to take the property from his possession. For unpaid stock subscriptions the corporation would, but for the bankruptcy, have a cause of action. *King v. Sullivan*, 93 Ga. 621 (20 S. E. 76). And to enforce that liability the trustee in bankruptcy may sue. *Commercial Bank v. Warthen*, 119 Ga. 990

(47 S. E. 536). If, instead of paying the subscriptions in cash, or in property at fair valuation, the stockholders go through the form of satisfying their obligations on their contracts of subscription by paying in property fraudulently overvalued, the law looks upon the subscriptions as still unpaid, and the trustee of the bankrupt corporation may sue to compel the delinquent stockholders to make good that of which the corporation has been deprived through the fraud. *Allen v. Grant*, 122 Ga. 552 (50 S. E. 494).

But the liability of the stockholders in each of the cases just mentioned is essentially different from the liability imposed by law upon the persons who undertake to organize a corporation and proceed to do business before the minimum capital stock is subscribed. When persons in this State apply for a charter for a corporation, and state what the capital stock of the corporation is to be, the expression "capital stock" means something. It means that the new creature of the law is to start out on its business career with assets of the amount stated. It means that those organizing the corporation, while desiring to exempt themselves from general individual liability for the liabilities that the corporation may incur, will see that it starts off in life endowed with this amount of money (or the equivalent of money) which is hazarded upon the enterprise. Those who are to deal with the corporation are publicly informed that this impersonal trader starts off with this much capital pledged to its success. Ten per cent. of the amount of the capital stock designated in the charter must be actually paid in before the corporation begins business. Civil Code (1910), § 2823 (3). The other ninety per cent. need not be paid in, provided the corporation holds unpaid stock subscriptions, bona fide taken, for that amount. *Bing v. Bank of Kingston*, 5 Ga. App. 578 (63 S. E. 652).

But the subscribers for the stock may be compelled to pay it in, and are individually liable for it whenever the interests of the corporation or of its creditors so require. Civil Code (1910), § 2823 (3). Thus, the amount paid in, or the amount paid in plus the individual liability of bona fide subscribers for the corporate stock, must always amount to as much as the capital which, according to representations made in the application for the charter, is to be employed; else the persons who, in violation of this promise and duty, organize the company and proceed to transact business in its name do not relieve themselves of personal liability for the debts

of the organization. In such cases the liability attaches to the promoters of the enterprise, not in their capacity as stockholders of the corporation, nor by reason of any contract between them and the corporation, but because they have violated the law and have broken a duty to persons dealing with the corporation as if it had been legally organized. The cause of action on this account does not arise in favor of the corporation, but arises in favor of those who have dealt with the organizers; that is, usually in favor of persons who have extended credit to the corporation on faith of the organizers' promise and their duty to see that it was endowed with the amount of capital stated in the charter. This cause of action does not pass to the trustee in the event the corporation is declared bankrupt. The plea in abatement setting up the pendency of the suit by the trustee in bankruptcy was properly stricken on demurrer.

3. The next question is whether the trial judge correctly held that the plaintiffs could not recover because their credit man knew at the time the goods were sold that only about ten per cent. of the stated capital had been subscribed for and paid in. From the testimony of this credit man it is not altogether plain that he knew that only this amount had been subscribed, but it is plain that he knew that only this amount had been paid in. His testimony does show, however, that organization was not complete at this time, and that he did not know that the remainder was not to be subscribed or paid in. Now "one extending credit to a corporation can not complain of acts of mismanagement on the part of officers and agents of the corporation prior to the time when the credit was extended." *Commercial Bank v. Warthen*, 119 Ga. 990 (47 S. E. 536). How far does this principle apply here? This transaction took place before the corporation formally began business, but was ratified by the corporation afterwards; for it took the goods and made payments on the account. The law does not require any part of the capital stock to be paid in until the corporation begins business; but prior to formal organization, while the necessary stock subscriptions are being obtained and other preliminaries are being attended to, many things of a provisional nature must often be done; and the law contemplates that they may be done. *Bing v. Bank of Kingston*, *supra*.

As to debts incurred by the organizers of the corporation while the affair is in this provisional state, they are liable as partners

until the corporation is duly organized and its corporate responsibility is substituted for their prior individual responsibility. In this case the responsibility was never shifted. There was no fraud and no wrong in the situation as it stood when these goods were sold. The time had not arrived when it became requisite that the full amount of the capital stock should be subscribed. These creditors had the right to act upon the assumption that these organizers would complete the organization as they had declared in the application for charter it would be completed; holding them individually liable in the meantime. What the credit man of the plaintiffs knew in this case charged the plaintiffs with knowledge that the corporation was not then legally organized, but not with notice that it would not be. The judge erred in granting nonsuit.

4. As to the point, raised by the defendants, that the liability against persons undertaking to organize a corporation is, by Civil Code (1910), § 2220, to make good "the minimum capital stock," and that the charter in the present case set no minimum, and that, therefore, no liability exists: Sometimes an application for charter recites that the capital to be employed shall not be less than so many dollars and not more than so many, or that it shall be so many dollars with a privilege of increase, and in such cases the lowest amount named is the minimum referred to in the code section; but in other cases, as in the one at bar, only one amount is named, and that, as it seems perfectly clear to us, is both minimum and maximum.

The other points made in the record are controlled by the views already set forth, and we need not enlarge upon them.

Judgment on the main bill of exceptions reversed; on the cross-bill affirmed.

3438. CASSEL & SISTER v. RANDALL.

HILL, C. J. Where the plaintiff's evidence shows that letters were written and duly mailed, properly addressed to the defendant, a presumption arises that they were received. This presumption is rebuttable, and is entirely overcome by the uncontradicted evidence of the defendant that the letters were never received. *Hamilton v. Stewart*, 108 Ga. 476 (34 S. E. 123), and citations.

2. The duty of the landlord to make repairs does not arise until he has knowledge of defects. The tenant, being in possession, must notify the

landlord of the need for repairs. *Dougherty v. Taylor & Norton Co.*, 5 Ga. App. 776 (63 S. E. 928); *Ocean Steamship Co. v. Hamilton*, 112 Ga. 901 (38 S. E. 204); *White v. Montgomery*, 58 Ga. 204.

3. Where the tenant and the landlord live in different cities, and the custom during the tenancy, for several years, has been for the tenant to make needed repairs and charge the cost of the repairs in the settlement of rent, the landlord has the right to assume that this custom will continue during the tenancy, unless expressly notified by the tenant to the contrary.
4. The uncontradicted evidence in this case showing that the landlord did not know of the necessity for making the repairs, and that the tenant had been in the habit, for several years, of making all needed repairs on the premises and deducting the costs therefor from the rent, which practice had been acquiesced in by the landlord, and the landlord had not been informed by the tenant of any discontinuance of such practice, the landlord was not liable for any damage to the property of the tenant caused by want of repairs; and a nonsuit was properly awarded.

Judgment affirmed.

DECIDED JANUARY 15, 1912. REHEARING DENIED FEBRUARY 27, 1912.

Action for damages; from city court of Macon—Judge Hodges.
March 26, 1911.

R. S. Wimberly, for plaintiffs. *Lane & Park*, for defendant.

3475. TAYLOR v. KNOWLES, executor.

POWELL, J. The plaintiff's petition disclosing that if he ever had a valid cause of action it had been ended by an executed compromise, the court did not err in dismissing it on demurrer.

Judgment affirmed.

DECIDED JANUARY 15, 1912. REHEARING DENIED FEBRUARY 27, 1912.

Action for breach of warranty; from city court of Floyd county—Judge Reece. May 10, 1911.

Henry Walker, for plaintiff.

Dean & Dean, J. M. Hunt, for defendant.

3321. BUSH v. HESSIG-ELLIS DRUG CO.

1. There was no error in striking the defendant's answer. In the absence of any effort to amend it, the averments of the answer were too vague and indefinite to present a defense, either as a plea of tender or as a plea of failure of consideration.
2. There was no error in refusing a nonsuit. The suit was upon an account

for the price of a certain beverage. The plaintiff introduced in evidence, without objection, a tripartite contract, signed by the defendant, as "dispenser," and by the plaintiff as "distributor," in which the defendant agreed to purchase and dispense a certain quantity of such beverage, manufactured by the third party to the contract. The fact that a third party was the manufacturer would not relieve the defendant from his obligation to the plaintiff under this contract.

3. The court erred in excluding testimony offered by the defendant to the effect that the beverage purchased by him was intoxicating. The contract between the plaintiff and the defendant required the plaintiff to sell and deliver to the defendant a non-intoxicating beverage. Ordinarily, where one purchases intoxicating liquor in a State in which the sale of such intoxicants is authorized by law, and the contract provides that it is to be performed in that State, he is liable for the purchase-price; and the fact that under the contract the liquor is delivered to the purchaser in a State in which the sale of intoxicating liquors is unlawful would present no defense to an action brought to recover the purchase-price. However, the ruling of the trial court, to the effect that, though the beverage sold might be intoxicating, that fact alone would not relieve the defendant from paying for it (though generally a correct statement of law in the abstract), was error, because the court overlooked the provisions of the contract involved, which required the delivery of a non-intoxicating beverage.

DECIDED FEBRUARY 29, 1912.

Complaint; from city court of Miller county—W. I. Geer, judge pro hac vice. January 27, 1911.

P. D. Rich, for plaintiff in error.

Bush & Stapleton, contra.

RUSSELL, J. The Hessig-Ellis Drug Company sued Bush upon an account stated. The defendant pleaded that the goods shipped to him were intoxicating liquors, and that the consideration was therefore illegal. He sought also to plead tender. By an amendment, which was stricken upon demurrer, he set out certain representations alleged to have been made to him by the agent of the plaintiff, in regard to the non-intoxicating quality of the beverage which was the subject-matter of the contract between the parties, and in reference to a certificate, which it was alleged was to be forwarded from some officer of the internal-revenue service. In the amendment he attempted also to plead a tender to return the goods, and failure of consideration. Upon the trial the court ruled out certain testimony upon the subject of tender, and also testimony of defendant to the effect that "Fan Taz," the beverage he had purchased, was intoxicating, that it was to be sold from the defendant's soda fount as a beverage, and that, as it was intoxicating, it

was valueless to the defendant. In regard to the latter testimony the court certifies that he did not allow the testimony, because, even though the article sold might be intoxicating, that fact in itself would not relieve the defendant from paying for it. The trial resulted in a verdict in favor of the plaintiff, for the amount sued for. The defendant excepts to the judgment overruling his motion for a new trial, and to the ruling striking the amendment to his answer.

1, 2. With the above statement of facts and the rulings contained in the headnotes, no further discussion of the first two points raised in the case would be profitable. Upon another trial it may be that the defendant can file a plea of tender conforming to the legal requirements; and he may also be in possession of facts which will enable him to file a good plea of failure of consideration; for if he purchased a non-intoxicating beverage and can establish that the liquid shipped to him was intoxicating, there would be a total failure of consideration, because the contract introduced by the plaintiff deals wholly with a non-intoxicating beverage. It is so described in the first statement of the contract.

3. According to the certificate of the trial judge, the testimony in regard to the intoxicating quality of the "Fan Taz" was excluded because the court was of the opinion that, "even though the stuff sold might be intoxicating, that within itself would not relieve defendant from paying for same." The court's ruling upon the subject of tender was correct (if for no other reason) because there was no plea of tender after the court had stricken the amendment. We think the court erred in excluding, upon the ground stated, the testimony to the effect that the "Fan Taz" purchased was an intoxicating liquor. The defendant had the right to show, if he could, that the liquid shipped to him was intoxicating; and this would have constituted a good defense. He could perhaps have established this fact even under the denials of indebtedness contained in his original answer. The first words in the contract introduced by the plaintiff, and the signing of which by the defendant gave the plaintiff a cause of action, are "Non-alcoholic beverages." In the absence of a plea setting out that this language was deceptive and used merely as a subterfuge to cover a sale of intoxicating liquors, forbidden by law, these words in the very forefront of the contract import a warranty that the "Fan Taz"

thereafter mentioned was non-alcoholic; certainly that it was not sufficiently alcoholic to be intoxicating. Under the ruling in the *Roberts* case, 4 *Ga. App.* 207 (60 S. E. 1082), it is possible that such a contract would not be violated if the beverage contained vegetable matter which required the presence of alcohol to preserve it, and if the percentage of alcohol used for that purpose was not sufficient to produce intoxication. But we doubt this, because the contract dealt with a beverage, and, under the provisions of the general prohibition law, no alcoholic intoxicating beverage can lawfully be sold. It is not to be presumed that the defendant, who was buying an article by wholesale, to sell it in turn at retail, wilfully intended to violate the law. Certainly if the amount of alcohol in the "Fan Taz" was sufficient to produce intoxication, so that "Fan Taz" could properly be said to be not only alcoholic but intoxicating as well, the sellers would have violated their obligation under the contract to furnish the purchaser what he contracted to buy, namely a non-alcoholic beverage.

It is, of course, settled, by numerous decisions (see especially *Rose v. State*, 133 *Ga.* 356-7-8-9, 65 S. E. 770, and citations), that one who is lawfully engaged in interstate commerce in intoxicating liquors in one State may sell and ship them to persons in another State, though such sales be prohibited by law within the limits of the latter State; and for this reason, among others, the plea which the defendant sought to interpose was properly stricken. The allegations of the plea (so far as it sought to set up that the contract was illegal and contrary to public policy) presented no issuable defense. If the defendant had ordered intoxicating liquors to be shipped by a dealer in Tennessee, engaged in interstate commerce in intoxicating liquors, and had received an intoxicant of the kind he ordered, and in accordance with the terms of his order, the debt would be enforceable against him, if no other reason appeared for its non-payment than that the contract was outlawed as contrary to good morals and the public policy of this State. The courts of this State may by comity enforce or refuse to enforce the laws of a sister State, dependent upon whether such laws, or contracts sought to be upheld under them, contravene the well-settled policy of Georgia; but the question with which we are now dealing is controlled by the constitutional right of Congress to regulate interstate commerce. Under our own

State constitution the Federal law takes precedence of ours. The trial judge correctly stated this general abstract principle in his ruling upon the testimony, but it was not applicable to the case. He erred in excluding testimony offered by the defendant, to the effect that the beverage purchased was intoxicating; because the contract between the plaintiff and the defendant required the plaintiff to sell and deliver to the defendant a non-intoxicating beverage. The question presented was not whether the sale was outlawed because the sale of intoxicants is prohibited in Georgia, but simply a question as to whether the purchaser had received what he ordered. Ordinarily, where one purchases intoxicating liquor in a State in which the sale of such intoxicants is authorized by law, and the contract provides that it is to be performed in that State, he is liable for the purchase-price; and the fact that under the contract the intoxicating liquor is delivered to the purchaser in a State in which the sale of intoxicating liquors is unlawful would present no defense to an action brought to recover the purchase-price. However, the ruling of the trial court to the effect that, though the beverage sold might be intoxicating, that fact alone would not relieve the defendant from paying for it (though generally a correct statement of law in the abstract), was error in the present case, because the court overlooked the provisions of the contract involved, which required the delivery of a non-intoxicating beverage.

The defendant would not be permitted, under the rulings cited in the *Rose* case, supra, to assert that the contract was void because the sale of intoxicating liquors in Georgia is prohibited, if he had purchased alcoholic and intoxicating liquors, but he should have been permitted to prove, under his answer and the amendment which was first filed, and which was not stricken, that alcoholic and intoxicating liquor was shipped him instead of the non-alcoholic beverage which was the subject-matter of his contract of purchase. Of course, if the judge had not placed his ruling upon the ground which he expressly certifies by note, the ruling excluding the testimony might be sustained; because the answer might have been a mere conclusion of the witness, without any facts upon which to base such conclusion. The defendant would have the right to show that the "Fan Taz" he received was intoxicating; but to do this there must be definite evidence of

substantive facts or experiments from which such a conclusion would reasonably arise, and not a mere statement of opinion or conjecture. *Judgment reversed. Pottle, J., not presiding.*

3341. MURPHEY v. CREAMER.

1. Several assignments of error in the motion for new trial are withdrawn from consideration by the ruling of the court below upon the demurrer, to which no exception was filed. The points presented by the demurrer are *res judicata*. Even though ordinarily the same points could properly be presented by motion for a new trial, the ruling on the demurrer, not excepted to, is the law of the case; and by this law the validity of the assignments of error is to be tested.
2. A ground of a motion for a new trial which purports to assign error upon the admission of testimony alleged to be objectionable presents nothing for the consideration of this court upon review, unless it affirmatively appears that the same objection was made upon the trial. "A ground of a motion for a new trial, assigning error upon the admission of certain quoted testimony over the objection of the movant, without stating what the objection was upon which the trial judge ruled, is so incomplete that this court can not pass upon it."
3. The court did not err in refusing to charge the jury that the rights of the lessee and his assigns under a lease for five years would prevail over and be superior to any subsequent rental from Parks (the landlord) to Creamer.
4. The consideration of a parol contract is not necessarily invalid because it is not payable on a definite day, for it may be mutually understood that such consideration is to be paid at a time or within a period which can be definitely ascertained.
5. A contract is not void for want of mutuality merely for the reason that it is agreed the purchase-price is to be paid from the proceeds or profits of a going business.
6. The failure to except to the ruling upon the demurrer pointing out that there was a misjoinder of distinct causes of action precludes any question of the correctness of the ruling, when it is sought to test its correctness by motion for a new trial. Even if the ruling is error, it may become the law of the case by failure to except in time, or by waiving the right to except. The excerpt from the charge to which exception is taken, however, is in the language of the Supreme Court in *Porter v. Johnson*, 96 Ga. 146-7 (23 S. E. 123), and, in view of the defendant's waiver of the right of exception, was not error.
7. The remaining assignments of error not specifically dealt with in the opinion are none of them of sufficient merit to warrant the grant of a new trial.

DECIDED FEBRUARY 29, 1912.

Action for damages; from city court of Richmond county—
Judge W. F. Eve. March 15, 1911.

The petition alleged, that on January 10, 1908, the plaintiff went into possession, as the owner, of a certain wood and coal yard in the city of Augusta, formerly known as the wood and coal yard of S. M. McKendree & Company; that prior to the date first mentioned it had been owned by the defendant, Murphey, either in his own right or in connection with one Zachry; that the business, with all equipment and appurtenances, was sold to him, by verbal contract, for \$2,400, payment to be made as the sales of the business would warrant, the defendant expressly agreeing not to press payments during the summer months; that the balance of the purchase-money was to become due within a reasonable time after the summer months were past, and that delivery of the property was made to the plaintiff in accordance with these stipulations; that the plaintiff paid \$1,465 on the purchase-price, leaving only an unpaid balance of \$935; that on July 29, 1908, the defendant came to the plaintiff's place of business and forcibly took possession of the wood-yard and all the equipment and appurtenances, and the stock of wood and coal, over the protest of the plaintiff's agent and without any authority of law; that the property thus seized by the defendant was worth \$2,400, and that, by reason of its appropriation, the plaintiff claims damages in the sum of \$1,500. The petition alleged also that the premises were rented by the plaintiff from one Parks, and that the invasion of the premises, in violation of the plaintiff's right to the same, was a wilful and malicious trespass, by reason of which the plaintiff was damaged in the sum of \$250.

Another paragraph of the petition alleged the issuance of a possessory warrant by the plaintiff for the recovery of certain personal property, including the door-key and a bunch of keys which had been seized by the defendant, and the award of the property, under the possessory warrant, to the plaintiff, whereupon the defendant sued out a writ of certiorari, which he thereafter allowed to be dismissed. It was also alleged, that after the decision of the magistrate in favor of the plaintiff, the defendant swore out a possessory warrant against the plaintiff before Bennett, a justice of the peace, alleging that the property which was in his (the defendant's) own possession was at that time in the possession of the plaintiff; and that this possessory warrant was sworn out solely for the purpose of affording the basis for a plea that the prop-

erty described in the possessory warrant issued at the instance of the plaintiff was in the possession of a constable of Bennett's court. The plaintiff charged that the certiorari proceeding was a malicious use of legal process, without probable cause, made for the purpose of delaying the plaintiff in the assertion of his legal rights, and to retain possession of the keys and books, so as to fortify the defendant in the seizure of the plaintiff's business.

The plaintiff also claimed damages in the sum of \$500 for malicious prosecution instituted by the defendant against him upon an accusation of trespass, and damages in the sum of \$1,000 for profits which he would have received in the natural course of trade, of which he was deprived by reason of the trespass, seizure, and dispossession at the hands of the defendant.

A demurrer to the plaintiff's petition was overruled, but no exception to this ruling was filed. The defendant's plea denied each and all of the several paragraphs of the petition, and was amended so as to allege, that what the plaintiff claimed was a sale was merely a proposition to sell, that no completed contract of sale was ever made, and that the plaintiff's possession of the property in question was merely as agent for the defendant. The plea also alleged that there was probable cause for the issuance of the warrant, and that all the acts of the defendant were in good faith, and not actuated by malice; and, moreover, that the alleged contract was violative of the statute of frauds. Upon the trial the jury rendered a verdict in favor of the plaintiff, for \$1,000 actual damages, and \$250 punitive damages.

E. H. Callaway, for plaintiff in error.

William H. Fleming, contra.

RUSSELL, J. (After stating the foregoing facts.) By the demurrer to the petition, which was overruled, the defendant asserted: (1) That the petition sets out no cause of action. (2) That the petition is multifarious, joining in one suit more than one cause of action, and joining separate and distinct causes of action arising out of the separate and distinct transactions occurring at different times and at different places. (3) That there is a misjoinder of causes of action, in this, that the alleged cause of action set out in paragraphs 1, 2, and 3 is *ex contractu*, and the alleged cause of action set out in paragraphs 4 to 6 are *ex delicto*,

and the cause of action in paragraph 7 is *ex contractu*. (4) That it affirmatively appears that the personal property referred to in paragraph 1 was not the property of the plaintiff, and that the alleged contract of sale was void. (5) That the separate cause of action set out in paragraph 4 is vague and indefinite, and the statement of facts therein sets out no cause of action. (6) That the allegations in paragraphs 5 and 6 set forth no cause of action. (7) That the petition and the allegations in paragraph 5 do not set out a cause of action or state facts entitling the plaintiff to damages because the defendant sued out the *certiorari* therein referred to. (8) That the facts set out in paragraph 6 do not set out a cause of action. (9) That the allegations in paragraph 7 do not set out a cause of action against the defendant; the allegations are vague, indefinite, and insufficient in law to constitute a cause of action. (10) That there is a misjoinder of causes of action; actions *ex contractu* and *ex delicto* being joined in one petition.

1. It is not necessary to rule upon the merits of any of these grounds of the demurrer; for no exception was taken to the judgment overruling it; and thereby the ruling upon the demurrer, whether right or wrong, became the law of the case. *Lovelace v. Missouri State Life Ins. Co.*, 1 Ga. App. 446 (58 S. E. 93). The disposition of the demurrer only rendered it obligatory upon the plaintiff to prove the statements of his petition, in order to make out a *prima facie* case. Applying the doctrine of *res judicata*, as laid down in the *Lovelace* case, *supra*, as well as in *Georgia Northern Ry. Co. v. Hutchins*, 119 Ga. 510 (46 S. E. 659), *Ray v. Anderson*, 117 Ga. 136 (43 S. E. 408), *Savannah, Florida & Western Ry. Co. v. Renfro*, 115 Ga. 774 (42 S. E. 88), and *Roberts v. Ivey*, 63 Ga. 623, to the ten grounds of the demurrer in the case at bar, it will be seen that several of the grounds of the motion for a new trial were practically eliminated, and present nothing for our consideration. This process of elimination applies to numbers 2, 18, and 19, alleging that the verdict is contrary to law and the principles of equity and justice; number 5, as to what constitutes a valid consideration; number 6, as to the definiteness of the terms of the contract; number 7, as to payments being made out of proceeds of the property conveyed by defendant to plain-

tiff; and number 8, as to the time when payments were to be made and the source from which the money was to be derived.

2. Several of the grounds of the motion for new trial complain of the admission of testimony, and state the reasons why the testimony objected to should not have been admitted. None of these assignments of error present anything for the consideration of this court, nor did they present anything for the consideration of the trial court at the hearing of the motion for new trial; for the reason that it does not appear that any objection now presented was made before the court at the time of the ruling complained of. The statement in an assignment of error that certain testimony is objectionable, and is now objected to for reasons therein stated, can not be considered, unless it affirmatively appears that the trial court ruled upon precisely the same objection, and that his judgment upon that objection was error. Nothing is better settled than that the distinct ground of objection to testimony must be clearly presented, and that, in default of an explicit statement of the ground of objection at the time the objection is interposed, the incorrectness of the court's ruling is immaterial, because no ruling has been properly invoked or required. *Soell v. State*, 4 Ga. App. 340 (61 S. E. 514). Where the point upon which a ruling is invoked in this court does not affirmatively appear to have been properly before the trial judge for his consideration, it is not error for the judge, when passing upon a motion for a new trial, to disregard this ground of the motion entirely, because defective. "A ground of a motion for a new trial, assigning error upon the admission of certain quoted testimony over the objection of the movant, without stating what the objection was upon which the trial judge ruled, is so incomplete that this court can not pass upon it." *McCray v. State*, 134 Ga. 416 (68 S. E. 62, 20 Ann. Cas. 101) This ruling disposes of the objections here urged to the admission of the possessory-warrant proceedings sued out by Murphey against Creamer, and to the possessory warrant sworn out by Creamer against Murphey, and the statement of Billings which Creamer was permitted to testify to.

3. In the third ground of the motion for a new trial the complaint is made that the court erred in refusing to charge the jury (on the issue as to whether Murphey or Creamer had the right of possession as the tenant of Parks as landlord) that "the rights of

the lessee and his assigns under the original lease from Parks, dated in January, 1906, to S. M. McKendree & Company, for a period of five years, would prevail over and be superior to any subsequent rental from Parks to Creamer, unless said written lease had been cancelled or surrendered." It is insisted by the learned counsel for plaintiff in error that, Parks having made a five-year lease to McKendree & Company in January, 1906, which had never been abrogated, surrendered, or forfeited, he was prevented from making any oral lease or contract with Creamer for the same premises in January, 1908; and that, for this reason, the instruction requested should have been given. Inasmuch as it appears that this contract was not transferred to Murphey until several months after Creamer had taken possession and after he had been recognized by Parks as his tenant, we fail to see any error in the refusal to charge as requested. The evidence was not undisputed that, at the time Creamer claimed to have rented the premises from Parks, Murphey was entitled to possession as tenant of Parks; and, unless it had been undisputed, the judge would have erred in charging as requested; for one of the vital points in the case was, who was Parks's tenant,—Murphey or Creamer; and it would not be true, as a matter of law, that the rights of the assignee of the contract of rental, acquired subsequently to Creamer's possession, would necessarily have been superior before the transfer, although they might have been so after the contract was formally assigned in writing.

4. The statement by the court that a promise or agreement to pay a certain price would be a consideration was not erroneous or calculated to mislead the jury, when considered in the light of the fact that it immediately followed an instruction upon the subject of consideration, which had been requested, in which the jury were told: "The consideration of a contract must be definite as to the amount or amounts, and the time or times of payment, so that the seller can enforce his rights and collect the same by suit, if not paid when due. A consideration which does not become due at some time definite or that can be made definite is not a valid consideration, and will not support a contract of sale." It is true that the sentence to which exception is taken does not refer to the definiteness of time which is essential in order to

create a contract, but that essential had been referred to so amply before that the jury could not have been misled.

5. One of the main grounds of objection urged in several assignments of error is that the contract which Creamer attempted to prove is a nudum pactum, because there is a total absence of mutuality. It is especially insisted that the contract is void because the only provision for the payment of the purchase-price is that it is to be paid from the proceeds of the business, and that this would be the payment to Murphey of his own property, and consequently no payment. We are cited to the cases of *Beall v. Clark*, 71 Ga. 818, and *Dorsey v. Parkwood*, 12 Howard (U. S.), 126, as authority for this proposition. We think the trial judge in this case went to the extreme limit in favor of the plaintiff in error when he charged that "a contract for the payment of the purchase-price of property from the proceeds of the property itself would be inoperative and void." He certainly did not commit an error when he later instructed the jury that a contract of purchase might be good which contemplated the payment of the purchase-price from the profits of the property purchased. The cases of *Beall v. Clark* and *Dorsey v. Parkwood*, supra, in our opinion, are not in point in this case. In the *Beall* case a minor son, to whose services a father was entitled, was told by his father that he would give him a certain plantation as soon as he made the money to pay the cost of it. The attempt to assert title in behalf of the son was based upon the code section which relates to the parol gift of real estate to a child, and the whole decision in the *Beall* case rests upon the proposition that the circumstances were not sufficient to raise the inference required by law in such cases. Our Supreme Court draws a distinction between the *Beall* case and the *Dorsey* case which clearly shows that our court was considering only the question of a parol gift of land by a father to his child. In the *Beall* case (p. 852) Justice Hall says, in regard to the *Dorsey* case: "In that case, the bargainer had no right to the services of the bargainee; *in this he had*, yet the Supreme Court of the United States held, without dissent upon the part of any of its members, that 'an agreement whereby the purchaser of a plantation bound himself' by writing, as appears from the record, 'to transfer to his son-in-law one half of the plantation, slaves, cattle and stock, as soon as the son-in-law should pay for one half

of the cost of said property, either with his own private means or with one half of the profits of the plantation, was deficient in mutuality.' The son-in-law was not bound to render any services nor pay any money." An examination of the Dorsey case shows that several legal considerations influenced the decision besides the lack of mutuality in the contract between Dorsey and Parkwood. While the portion of the headnote quoted by Justice Hall might lead to the conclusion that lack of mutuality alone controlled the decision, it must be borne in mind that there was absolutely no time fixed for the stipulated payment of half of the purchase-price, and that the court stated, as reasons for denial of the decree for specific performance, that the plaintiff, if bound at all, had shown no performance or offer of performance after an interval of 27 years, and also that there was a release. However, the plaintiff in error in the present case can not complain of the charge of the court upon this point, because the judge did instruct the jury, in one portion of his charge, that if they found Creamer's payments were to be confined exclusively to the proceeds of the property transferred, that would be no consideration, and there would be a lack of mutuality. Of course, in charging the converse of this proposition, the court was correct in telling the jury that if the contract was for a specific amount, and was not limited to the property transferred, then there would be mutuality, and the contract would be binding. It is evident that the use of the word "definite" did not mislead or confuse the jury, because, from the context, it is quite apparent that the judge was referring to the oral argument in behalf of the defendant, rather than to the pleadings filed in his defense. There can be no mistaking that it was argued there, as it has been ably insisted here, on the part of the then defendant, that the contract as to the property which Creamer claimed to have bought was void for lack of mutuality; because the judge proceeded to tell the jury that if payment under the proposed contract "was limited to the proceeds of the property sold, the seller would be paying himself exclusively out of his own property, and there would be nothing assumed by the party on the other side." The judge, in our opinion, did not err in adding, in response to a direct question propounded by the foreman of the jury in asking for instructions, that the lack of mutuality would be confined to the property actually transferred, and not the proceeds from other

sources in the furtherance of the business. In other words, the test is: Was there liability for the amount specified in the contract? According to Creamer's testimony, he was bound in any event to pay \$2,400. He agreed for Murphey to sell, for \$1,465, a certain portion of the assets, some of which he distinctly testified were of no use to him in the business; and, while there is no direct evidence that he would not have been able to procure from some outside source, by pledging his assets, and by borrowing on personal security, or otherwise, the remainder due upon the purchase-price of \$2,400, still, granting for the sake of the argument that the remainder of the purchase-price was to be paid by the close of the next season, from the profits of the business, the sale is not for that reason void for want of mutuality. Conceding that the fact that there will be profits is uncertain, still if the purchase-price is not paid when the limit fixed for payment has arrived, the purchaser becomes liable for the unpaid purchase-price, and judgment can be recovered against him. The mere stipulation that the payment is to be made from profits would not of itself necessarily evidence that the purchase-price would not be paid, or even that it would not be paid from the profits, nor would it necessarily evidence that payment from the profits of the property sold would be only payment to the seller of his own. A sale may be perfectly valid and yet contemplate that the payments are to be made exclusively from profits in the articles sold, where it is understood and agreed that the services and skill of the purchaser are necessary to carry on a going business. According to the testimony of Creamer, the profits of the successor's business and the consequent payments were dependent not only upon his business judgment and efficient management, but were made possible by his actual physical participation in the labor necessary to carry on the wood and coal business. The jury had the right to take this view of the matter. A case could be imagined where a salesman whose services were actually worth a large monthly salary might take a small stock of merchandise, and, with sufficient financial support, and by furnishing his services at much less than their market value, earn such profits in the business as would more than pay the purchase-price of the original stock of goods with the difference between the actual monetary value of his service in drawing trade and making profitable sales and the much smaller amount actually drawn out by himself for

living expenses. In such a case it could not be said, if the purchaser built up the business and paid the former owner all he contracted to pay that he should pay him more, or that the business still belonged to the former owner because the stipulated purchase-price had been paid from profits on a stock of goods which was, at the time of the contract, his exclusive property. In our opinion, the purchase-price may be paid out of the proceeds of a resale of specific property, even though the property be realty; and a valid contract of sale may be made and pass title, when the three following essential ingredients are shown: (a) intention to pass title; (b) delivery in pursuance to the agreement; (c) the undertaking of the vendee to bestow his time and skill in making advantageous sales, such as making retail sales of goods bought by him in bulk, in case personal property is the subject-matter of the contract, or the making of advantageous sales by proper advertisement, settlement, promotion, and subdivision, in case of a contract for the sale of land.

6. Under the evidence in this case one of the issues was whether Murphey's motive in having Creamer arrested under the warrant for trespass was to have him punished for a violation of the law, or whether it was his object, by means of the criminal prosecution, to compel Creamer to surrender to him the property in dispute. This issue was to be determined by the jury, and the excerpt from the judge's charge upon the subject of malicious abuse and malicious use of legal process was not prejudicial to the plaintiff in error. Even if the judge did not distinctly classify the pending action, he properly distinguished the malicious abuse of legal process from malicious use of legal process, in the identical language employed by Chief Justice Simmons in *Porter v. Johnson*, 96 Ga. 146-7 (23 S. E. 123). Otherwise than as pointed out in the opinion in that case, an action for malicious use of legal process seems to differ from one for malicious abuse of like process mainly in the fact that where a malicious use of legal process is alleged, it must also be alleged that the suit upon which the action is based has terminated, while in the case of malicious abuse of legal process an averment to that effect is unnecessary. *Mullins v. Matthews*, 122 Ga. 286 (50 S. E. 101); *King v. Farbray*, 136 Ga. 212 (71 S. E. 131). Even if there was a misjoinder, the overruling of the demurrer presenting that objection not being excepted to, the judgment upon that point became the law of the case; and for this reason, though the allega-

tions of the plaintiff's petition should set forth a case of malicious use of legal process, as well as declare upon a malicious abuse of legal process, the actions could be properly joined.

7. Without entering upon a discussion of the remaining grounds of the motion for a new trial (each of which we have carefully weighed), it suffices to say that none of the errors assigned would authorize the grant of a new trial. It is plain that the modification or qualification of the judge's instruction (as to the necessity that the alleged contract of sale should fix a definite time for payment), to the effect that where no definite time is fixed payment shall be made in a reasonable time, was not error. An abundance of authorities sustain the proposition that it is not essential that a definite day of payment shall be fixed by the contract; and where payment is to be made within a specific period of time, it is only necessary that payment shall be actually made before the expiration of that period; and such a stipulation does not invalidate the contract of purchase. The jury appears to have taken a view of the evidence which fully authorized their finding, though an inference directly to the contrary was authorized. The charge of the court fully presented the contentions of the parties, and, upon the controlling principles of law involved, was as fair to the plaintiff in error as he had any right to expect. The major portion of the instructions requested were fully covered by the general charge; and where the instruction embodied in the request was wholly refused, it is apparent that the refusal was properly based upon the fact that the request, while embodying a correct principle of law, was not applicable to the evidence adduced upon the trial. The assignment of error which complains of the judge's refusal to instruct the jury, as requested, that the rights of McKendree & Company, and their assigns, under Parks's written lease, would prevail over Parks's rental to Creamer, affords an example typifying more than one of these assignments of error. The request in that instance would not have been authorized by the evidence. It was undisputed that the lease had not been assigned to Murphey at the time that the present cause of action arose. It may also be said, as to the qualification placed by the presiding judge upon the instructions requested, that they appear to be authorized in every instance.

Judgment affirmed. Pottle, J., not presiding.

3529. MORTON v. CITY OF ROME.

HILL, C. J. 1. "The writ of certiorari can not be used to bring in question the legal existence of the court to which the writ is directed." *Bass v. Milledgeville*, 122 Ga. 177 (50 S. E. 59).

2. There was no error in refusing to sanction the application for the writ of certiorari. *Judgment affirmed.*

DECIDED JANUARY 15, 1912. REHEARING DENIED MARCH 2, 1912.

Certiorari; from Floyd superior court—Judge Maddox. May 27, 1911.

Henry Walker, for plaintiff in error. *Max Meyerhardt*, contra.

ON MOTION FOR REHEARING.

HILL, C. J. The ruling embodied in the first paragraph of the decision conclusively decides this case and renders unnecessary a discussion of the other questions raised.

In one of the grounds of the petition for certiorari it is insisted that the recorder's court of the city of Rome does not exist, having been abolished on August 10, 1909. In this view of the case it was entirely immaterial, in the consideration of the certiorari by the judge of the superior court, whether the charter of the City of East Rome still exists or has been repealed. It is strenuously insisted by counsel for the plaintiff in error that the act which sought to include the territory embraced in the City of East Rome within the corporate limits of Rome was ineffectual for that purpose, because the legislature, six days after the passage of that act, passed an act amending the charter of East Rome; and it is also insisted that the assumption that the charter of East Rome has been repealed, in the opinion of the Supreme Court in *Ivey v. Rome*, 129 Ga. 286 (58 S. E. 852), is mere obiter, because the question was not directly presented or involved, and we are asked to certify this question to the Supreme Court. Under the terms of the constitutional amendment creating this court, we are not permitted to uselessly certify questions to the Supreme Court. It is only when an answer to the certified question is material to the proper determination of the cause that we are permitted to certify questions for instructions. Since the Supreme Court decided in *Bass v. Milledgeville*, 122 Ga. 177 (50 S. E. 59), that the writ of certiorari can not be used to bring in question the legal existence of the court to which the writ is directed, the judge of the superior court was necessarily compelled to refuse to sanction the writ of certiorari. The application for rehearing is denied.

3653. MALLOCH & Co. v. KICKLIGHTER.

- RUSSELL, J. 1. The assignments of error alleging that certain instructions of the court were not authorized, and were "otherwise illegal," are not supported by the record. The evidence authorized the instructions given; and if these instructions were for any other reason illegal, the allegation that they were "otherwise illegal" is too general to present any point for the consideration of this court.
2. The evidence authorized the court to instruct the jury that wherever there is a breach of contract, the party injured by the breach is bound to make reasonable efforts to minimize his damages, and that if, in this case, there was a breach or breaches of the contract, by Malloch & Company, it was Kicklighter's duty, if he could, to minimize his damages.
3. The question as to whether the plaintiff, by agreeing that certain cotton be handled by the defendants as factors, for the account of and under the direction of the bank, which had a title to the cotton by reason of ownership of the bills of lading, surrendered any rights claimed by him, or which he may have had, due to a breach of a prior contract with the same factors, was an issue of fact, and was properly submitted by the court to the jury for determination. Nor did the court err in instructing the jury, in this connection, that a surrender of the plaintiff's pre-existing rights, growing out of a breach of the contract by the factors, would not necessarily arise, unless the plaintiff expressly or impliedly agreed that if they handled the cotton he would surrender his claim against them.
4. It was the duty of the court to construe for the jury the written memorandum in evidence, and the court did not err in instructing them, in that connection, that such memorandum of remarks was not in and of itself an express release of the plaintiff's demands.

Judgment affirmed.

DECIDED FEBRUARY 12, 1912. REHEARING DENIED MARCH 2, 1912.

Complaint; from city court of Savannah—Judge Davis Freeman.
June 26, 1911.

Adams & Adams, for plaintiffs in error.

A. L. Alexander, Osborne & Lawrence, contra.

3697. GRAY & DUDLEY HARDWARE COMPANY v. CORNELIA FURNITURE COMPANY.

POTTLE, J. Under the ruling of this court in *Brown v. Pickett*, 3 Ga. App. 554, the court erred in refusing to sustain the certiorari.

Judgment reversed.

DECIDED FEBRUARY 12, 1912. REHEARING DENIED MARCH 2, 1912.

Certiorari; from Habersham superior court—Judge J. B. Jones.
August 17, 1911.

McMillan & Erwin, W. S. Paris, for plaintiff in error.
J. C. Edwards, R. C. Ramey, contra.

3411. WESTERN UNION TELEGRAPH CO. *v.* FORD.

- 1, 2. This court held, when the case was here on exception to the judgment overruling the demurrer to the petition, that the allegations of the petition made a cause of action. On the trial these allegations were substantially proved.
3. Where the issue is as to the reasonable probability of saving an eye affected with corneal ulcer, and this is provable only by expert evidence, the opinion of an expert, based on his own experience and knowledge acquired from statistics, that seventy per cent. of eyes affected like the plaintiff's eye are saved by treatment applied in ten or twelve hours after the premonitory symptoms first occur, is competent evidence.
4. Where a contract requires written presentation of a claim within sixty days, the filing of a suit, and service thereon within sixty days, will suffice as a written presentation of the claim, provided the allegations of the petition sufficiently inform the defendant of the identity, nature, and extent of the claim; and this is true although the suit may have been withdrawn or dismissed after filing and service, and another suit for the same cause of action renewed within the statutory limitation. Sufficient notice of the claim having been once given, the effect of the notice is not destroyed by the subsequent exigencies of pleading.
5. The excerpts from the charge, taken in connection with the general instructions, contain no material error. The charge, as a whole, clearly presented, as the true standard of diligence, ordinary care in the transmission and delivery of the telegram after its reception by an agent of the defendant charged with that duty. The words "ordinary care" are self-explanatory, and the failure to define their meaning, in the absence of a timely written request, is not reversible error.
6. Where the evidence demands the finding that a named person was the agent of the defendant, the trial judge is not required to define the legal meaning of the term "agency," or to submit to the jury the question of agency as an issue under the evidence.
7. Under the evidence it was wholly immaterial whether the day on which the telegram was received for transmission was a legal holiday. Irrespective of that question, the jury were authorized to infer that the message could have been transmitted and delivered to the addressee. Besides, the defendant company, having received the message on a legal holiday, was under the duty of using ordinary care in transmitting and delivering it promptly.
8. No material error of law appears; and while the evidence in support of the verdict is not free from doubt and is not entirely satisfactory, yet this court can not say there was no evidence from which the jury, the exclusive arbiters of the facts, could not reasonably have concluded that the defendant was liable in damages.

DECIDED FEBRUARY 24, 1912. REHEARING DENIED MARCH 2, 1912.

Action for damages; from city court of Moultrie—Judge McKenzie. April 22, 1911.

When this case was previously before this court the judgment of the lower court, dismissing the petition on general demurrer, was reversed, it being the opinion of this court that the allegations of the petition set forth a cause of action. Following this decision a trial was had, and a verdict was rendered for the plaintiff, for \$5,000; the defendant's motion for a new trial was overruled, and the case is here for review. The allegations of the petition are fully set out in the opinion of the court on the demurrer. *Western Union Telegraph Co. v. Ford*, 8 Ga. App. 514 (70 S. E. 65). It is necessary, however, to give a brief statement of the allegations, as well as a substantial statement of the evidence, in order that the questions raised may be clearly understood, and that it may be seen whether the allegations as made were proved.

The plaintiff alleges, that she was suffering from an affection of the eye known as "purulent conjunctivitis, there being symptoms of iritis." She was under treatment for this affection by a specialist who resided at Moultrie, Georgia. This specialist informed plaintiff and her husband that should iritis set in, a corneal ulcer would form on the eye, and, unless promptly stopped, it would spread to the vision and cause the loss of the eye, and he described to them the premonitory symptoms of corneal ulcer, so that they would recognize it and know when to send for him promptly. About 5 o'clock on the morning of July 5, 1909, plaintiff felt these premonitory symptoms. She thereupon immediately caused her husband to send a message by hand through the country to Dr. Odum, who was treating her, in connection with the specialist, for this eye trouble, and who lived at Barney, Ga., with a request that he send a message to the specialist, asking him to come to her residence. There is no telegraph office at Barney, so this message was telephoned by Dr. Odum from Barney to Quitman, Ga., and there delivered to the defendant company, this being the usual way that messages intended to be telegraphed from Quitman were transmitted from Barney to Quitman. Between 8 and 9 o'clock on the same morning the message was delivered by Dr. Odum to the defendant at Quitman, and was as follows: "Barney, Ga., July 5. Dr. Jenkins, Moultrie, Ga. Come out to J. M. Ford's place. [Signed] Dr. Odum." It is alleged, that this telegram could have

been delivered by ordinary diligence within fifteen minutes after the receipt thereof to Dr. Jenkins, the addressee, as Moultrie was within fifty miles of Quitman by wire; that the defendant company negligently failed to deliver this message to the addressee until 10.30 o'clock on the morning of July 6, a delay of more than twenty-five hours; that if the message had been delivered promptly, Dr. Jenkins "could and would have immediately gone to petitioner's house, and he would have at once stopped the spread of the ulcer before it reached the vision of the eye, and would have saved petitioner's said right eye." On receiving the telegram he did go to plaintiff's house, and, although he succeeded in arresting the progress of the ulcer, it had in the last twenty-four hours immediately preceding his arrival made such progress that the vision of the right eye was destroyed, making it necessary to have the eye removed to prevent the loss of the other eye. Dr. Jenkins lived in the city of Moultrie. His residence and office was within 400 yards of the defendant's office in Moultrie. He was at his office and residence all day on July 5, and the message could, in the exercise of ordinary care, easily have been delivered to him early on the morning of July 5 in ample time for him to have gone to petitioner's home and arrested the progress of the disease, and if he had received the message, he would have gone to her and have arrested the disease and saved her eye. Except for the fact that she was relying on the defendant to promptly transmit the message, she could and would have made other arrangements to secure the prompt attendance of the specialist, and she seeks to recover damages for the negligent failure of the telegraph company to transmit and deliver the message to the specialist, whereby he was prevented from earlier attendance and earlier treatment of her eye, claiming that this negligence was the proximate cause of the loss of her eye. She claims damages not only for the loss of the eye, but for mental anguish and physical pain which she suffered from the progress of the ulcer, and the mortification she will suffer from the loss of her eye during her entire life; from the resulting danger to the other eye, and from the apprehension that she will become permanently blind. An amendment to the petition alleged, that the message in question was delivered to the defendant company at Quitman, Ga., between 9 and 10 o'clock on the morning of July 5, 1909, and also that the ulcer reached the condition by and from which the

vision of the eye was destroyed after 12 o'clock on the night of July 5, and that if the message had been delivered to Dr. Jerkins at any time prior to 8 o'clock on that night, he would have responded to the telegram, would have come to petitioner's home, would have stopped the spread of the ulcer before it reached the vision of the eye, and could and would have saved petitioner's eye.

It was not controverted that the plaintiff was suffering from an affection of the eye as described; that on Friday night, July 2, Dr. Jerkins discovered the premonitory symptoms of corneal ulcer, and warned her and her husband at that time that if it developed and was not promptly checked, it would destroy the vision of the eye; that she felt these premonitory symptoms on Monday, July 5, about 5 o'clock a. m., and that her husband wrote a note to Dr. Odum and sent it to Barney, where Dr. Odum lived, six miles away, and Dr. Odum communicated this message to one Harrell, who was the representative of the South Georgia Railroad Company at Quitman, asking him to send the message to Dr. Jerkins. Here appears the first conflict in the evidence. Dr. Odum, for the plaintiff, testified, that he communicated this message to Harrell between 7 and 8.30 o'clock, certainly not as late as 10 o'clock on the morning of July 5; that while he did not advise Harrell of Mrs. Ford's condition and the danger that might result from delay, he nevertheless urged upon him the prompt sending of the message. Harrell testified, for the defendant, that he received this telephone communication from Dr. Odum at 10.20 o'clock Monday morning; that upon receipt of the message he noted the time of its reception, by a pencil memorandum made upon a carbon copy of the telegram; that when he received the message from Dr. Odum, he told him that the day was being observed as a legal holiday, and that it was doubtful if the message could be forwarded. Dr. Odum denied that Harrell stated to him at that time that it was a legal holiday, or that it was doubtful if the message could be sent; but testified that Harrell did make this statement when he called him the second time, at 2 o'clock, to ascertain if the message had been sent. Dr. Odum testified, however, that he knew that the day was a legal holiday. There is no telegraph office at Barney. The South Georgia Railroad Company had a private telephone line operating between Barney and Quitman. If a person at Barney desired to send a telegram over the Western Union Telegraph line from Quitman,

he could give it to the agent of the South Georgia Railroad Company at Barney, and this agent would collect from him the toll charged by the telephone line for communicating the message to the telegraph operator at Quitman, and would also collect the amount of the message that would have to be paid to the telegraph company at Quitman for forwarding the message over its line. The agent of the railroad company at Barney, upon receiving this message, would call up the agent of the South Georgia Railroad Company at Quitman, who in this case was Harrell, and communicate the message to be sent, and this agent of the railroad company at Quitman would write out the message on a blank of the telegraph company and send it to the telegraph office for transmission, or call up the telegraph office and have it send a messenger for the message. In the present instance Dr. Odum went to the depot of the South Georgia Railroad Company at Barney, and tried to get the agent to call up Harrell at Quitman. The agent endeavored to do so, but could not get him over the telephone. Dr. Odum thereupon called up the Western Union at Quitman and told the operator that he had a message. The person who answered the telephone at the Western Union office directed him to give it to the railroad agent at Barney, as they wanted pay for it, and Dr. Odum replied that he could not get up the agent. Subsequently Dr. Odum called Harrell up over the local line and gave him the message as stated. Harrell testified, that the above method of sending messages from Barney to Quitman, to be transmitted over the Western Union Company's lines, was the general custom, and that the agent of the railroad company collected not only the toll for the telephone company, but also the toll for the telegraph company and had monthly settlements with the telegraph company as to the tolls due it. Dr. Odum further testified, that in his telephone communication with the Western Union office at Quitman the operator told him that he could make an arrangement with the South Georgia Railroad Company by which the message would be transmitted to the Western Union Telegraph Company at Quitman, and that he thereupon communicated with Harrell over the long-distance line at Quitman, gave him the message, and told him that he would go down to the office of the South Georgia Railroad Company at Barney and pay for the message, and to be sure to get the message off, and Harrell replied that he would. Harrell testified, that he

was acting in the matter for the sender of the telegram and for the telephone company; that he had no connection with the Western Union Telegraph Company, but that the Western Union Company got twenty-five cents, which was collected by the agent of the railroad company for sending the message from Quitman to Moultrie. The agent of the Western Union Company at Quitman testified, that July 5 was a legal holiday; that on legal holidays the office hours of the company were from 8 to 10 in the morning, and from 4 to 6 in the afternoon, and that the office at Moultrie observed the same hours; that the telegram in question was given to him at Quitman by the agent of the South Georgia Railroad Company; that he does not remember in this particular case how it reached the office, but that it was customary for his office to send messengers when they were called for to the railroad office to get the messages; that this telegram was received at his office at 10.33 o'clock on July 5; that on receiving the message he put on it a memorandum of the time of its reception; that he immediately called the Moultrie office over the local wire; that the Moultrie office could not have been open at that time (in view of the custom of observing legal holidays); that he received no answer at the Moultrie office; that he again called the Moultrie office, at 11 o'clock, and again at 11.20, and next at 12 o'clock; that he called again at 12.50, but received no answer to any of the calls; that according to the records of his office, he did not call the Moultrie office again until next day, July 6, at 9.45 o'clock; that he remembers no effort to get the message to the Moultrie office between 12.50 on July 5, until 9.45 on July 6; that when he received the message he had no notice from Harrell that Mrs. Ford had any connection with the telegram, or that her eye was in a critical condition, nor any statement indicating urgency in transmitting the telegram to the addressee. The evidence further shows that the office at Moultrie was open from 8 until 10 a. m., July 5, and again from 4 until 6 in the afternoon, but that no message was received from Quitman, and in fact no message could have been received direct from Quitman over the local wire, because the wire was not in good order. The message may have been sent from Quitman to Moultrie by way of Savannah, Jacksonville, or Atlanta, during the hours that the offices were open on that day. It was further shown that the Postal Telegraph Company had an office at Quitman, connecting with Moultrie, which was open on

July 5, and that there was telephone communication between these two places. Jones, the agent of the Western Union Company at Quitman, testified, that if the lines were working and in good order, it would take about a minute to send a message of seven words from Quitman to Moultrie, and that he and his brother were the agents of the Southern Bell Telephone Company at Quitman, he being the agent of the Western Union at Quitman also; that he did not try to send the message by telephone to Moultrie. He testified also as to his method of transmitting telegraph messages between Barney and Quitman, intended to be sent beyond Quitman by way of the telegraph company's lines, stating that such messages are sent from Barney over long-distance telephone, "and the South Georgia Telephone Company collects for the message and turns it over to us, and we send it through, and at the end of the month we have a settlement between us for the toll on these messages;" and this arrangement between the Western Union Company and the South Georgia Company was similar in character to the arrangements the Western Union Company had with any "concerns in Quitman whose credit was good." Jones further testified, that after failing to get Moultrie directly, he made one effort to get it by way of Savannah, in order to send the message, but that the operator at Savannah declined to take the message, stating that he had the same wire that the office at Savannah had to Moultrie, and that he had as good a chance to get Moultrie as Savannah had. The foregoing is a statement, in substance, of the evidence tending to illustrate the question of negligent conduct on the part of the defendant telegraph company in receiving and transmitting the message in question.

Dr. Jenkins gave a description of the condition of the plaintiff's eye on the Friday before the Monday in question, and told of his discovery then of the premonitory symptoms and the probability of the formation of a corneal ulcer, and of the information which he gave to the plaintiff and her husband as to the necessity for prompt action when she felt these symptoms. He testified, that he was in his office at Moultrie all day July 5; that if he had received the message on July 5 he would have gotten off as quickly as possible in response thereto, and could have reached the home of the plaintiff in one hour in his automobile; that he did not receive the telegram until July 6; that he immediately left for plaintiff's home,

reaching there about 12 o'clock; that he found that the corneal ulcer had developed, and he began treatment therefor, but that it did not yield to treatment, and that it finally progressed until the vision was lost and it became necessary to take out the eye in order to save the other one. "If I had been able to reach this lady by 12 o'clock noon on July 5, it is impossible to say just what would have been the result of the treatment of this corneal ulcer, which I found developed when I got there. My opinion is that I could have healed the ulcer without leaving a very large scar. She would have had some vision if I could have healed it before. If I could have seen her at 8 or 9 o'clock on the night of July 5, 1909, I would have had a better chance than later. I could not say that it could have been healed at that time. I do not know how fast it was developing. I could only say that I could have had a better chance at it earlier. This ulcer spread pretty fast. Had this ulcer first made its appearance at 5 o'clock July 5, I could not say, I do not know, at what time it would advance to such a state as to be a hopeless case with reference to treating the eye, with reference to saving the sight. An ulcer of this nature spreads very fast. . . I do not know what condition it was in on Monday morning. If that purulent discharge was not under control on Monday morning, when the well-developed symptoms of the corneal ulcer appeared so that Mrs. Ford could recognize it, the difference of either ten or twelve hours in my getting there would have produced an effect in reference to stopping that ulcer, *in all reasonable probability*. *I would have been able to have kept this discharge out of the ulcer, and have kept it under better control.* If the purulent discharge was not in control at 6 or 7 o'clock on the morning of July 5, with the symptoms of corneal ulcer so evident that Mrs. Ford herself could recognize them, and I could not have gotten there until 5 or 6 o'clock that night, it would have been pretty doubtful at that time that I could have stopped the spread of the corneal ulcer and saved the eye, if the discharge had still been going on. If the purulent discharge was not under control on the morning of July 5, and I had not been able to get there until about 5 or 6 o'clock that night, the probability would have been against my being able to save the eye, but the discharge was under control the last time I saw it, on Friday or Saturday, and there was not any discharge the next time I saw it, Tuesday. . . It might have been I could

not have stopped it from spreading in the beginning, *but I believe I could right after it started. If I could have seen it right after it started, there would have been a reasonable probability that I could have saved the eye.* If I could have seen it for twelve hours, what the probabilities were I of course could not say, but every hour would have helped; I believe I could though. If I could not have seen it until 5 or 6 o'clock the evening before, the reasonable probabilities, the chances against my being able to save the eye, would be about equal. . . . The percentage of eyes saved, affected like this eye was, provided you get to them within 10 or 12 hours after you feel the sharp pains that occur, taking everything into consideration, is probably about seventy per cent. There is probably not one in a hundred that would be affected just alike; but I should think after this iritis had subsided, an ulcer in this condition ought to be controlled in that length of time, probably seventy per cent. of them. I could not swear to it; that is my opinion. . . . When I got there something like half of the sight on the upper part had not been covered. It was a critical case for the sight from the very jump. If it extends with equal rapidity in all directions, every minute the sight is dying. I did not arrest the disintegration of the tissue. It kept right on until it passed over the entire pupil. The cornea is bigger than the pupil. It covers the whole colored portion of the eye. With iritis on one side of the cornea and conjunctivitis on the other side, the sum total of the effects of these two diseases would be to put the vision out of commission, and into a weakened condition where it would be more susceptible to the ravages of corneal ulcer than otherwise. And in order to arrest corneal ulcer under such circumstances, it is much more difficult than it would have been if it had occurred outside of any connection with conjunctivitis and iritis. I have been treating diseases of the eye for about twelve years. . . . I have seen a few cases like this case in my practice. I do not recall how many cases. Of these cases similar to this I only lost one. . . . I have known one to get well. Where iritis and conjunctivitis had set in and when the first symptoms of corneal ulcer were seen, whether it would be possible to save the eye if you neglected the treatment two days and nights is hard to tell. I do not think so. When I saw this lady the last time before Tuesday, July 6, she did not have a developed case of corneal ulcer."

Dr. Dunbar Roy, an oculist from Atlanta, who had been engaged in the practice of his specialty for eighteen years, having studied both in this country and in Europe, testified, in substance, that if the plaintiff had been suffering from purulent conjunctivitis and iritis on Friday, and on that day symptoms of corneal ulcer were forming, and by the following Monday morning by 5 o'clock these symptoms had become so plain as to cause a roughness indicating breaking down of the cornea, the chances to save the sight, if treatment was not begun until after that time, were very poor, because of the fact that the cornea has very little vitality, and if it once becomes affected, the chances are that it is going on to destruction; that under these conditions the chances for recovery would be extremely slim; and that if on Monday morning at 5 o'clock the patient herself recognized the breaking down of the cornea from this ulcer, if the physician could have gotten to her that afternoon at 5 o'clock, the chances would have been against saving the eye, although it would be impossible to say that the eye could not have been saved. If the physician could have gotten to the patient at 8 o'clock Monday morning, three hours after she had noticed the symptoms, it is impossible to say what would have been the reasonable probability of saving the eye at that time. If the outcome is the loss of the eye within thirty hours after the patient begins to feel the roughness, I do not believe anything in the world would have saved the eye or the cornea, even had the physician reached her earlier.

W. A. Covington, Dorsey, Brewster, Howell & Heyman, for plaintiff in error.

Shipp & Kline, contra.

RUSSELL, J. (After stating the foregoing facts.)

1. The first question which arises for decision is whether, under the evidence, the telegraph company was guilty of culpable negligence in delaying the transmission and delivery of the message to the physician at Moultrie. The determination of this issue depends almost entirely upon the relationship which Harrell, the agent of the South Georgia Railroad Company at Quitman, occupied towards the parties. Was he the agent of the defendant telegraph company in receiving the message from Dr. Odum, or was he the agent of the sender of the message, or was he in a sense the agent of both the telegraph company and the sender? It is earnestly con-

tended by learned counsel for plaintiff in error that Harrell was not the agent of the Western Union Telegraph Company in any sense; that the evidence demanded the finding that he was solely the agent of the sender in receiving and sending this message to Jones, the operator of the Western Union Company at Quitman. We have given the evidence bearing on this point careful consideration, and we have come to the conclusion that Harrell occupied the dual capacity of agent of both the sender and the Western Union Telegraph Company in receiving and sending the message; that in so far as the transmission of the message to the operator at Quitman to be sent to Moultrie is concerned, he was acting as the agent of the Western Union Telegraph Company. The undisputed evidence shows that in the absence of any telegraph station at Barney, Georgia, it was the custom for the agent of the South Georgia Railroad Company at Barney to receive messages, and not only to collect a toll for the railroad company for sending the message to Quitman over its telephone wire, but also to collect for the telegraph company the toll due to it for the transmission of the message from Quitman to its destination. In this case, in addition to this custom, it appears that Dr. Odum was specially directed by the operator of the Western Union Company at Quitman to send this message through the agent of the railroad company, by way of its telephone wire from Barney to Quitman, and to pay to this agent the toll due for the message to be sent to Moultrie. The Western Union Telegraph Company, having thus authorized the agent of the railroad company to receive messages intended for it, and also to receive in its behalf pay for such messages, constituted the railroad agent its agent for these purposes. We think that under these facts the question of Harrell's agency for the purpose of receiving the message for the telephone and telegraph companies was not issuable, and the court did not commit any error against the telegraph company in submitting this question of agency, in a general way, to be determined by the jury. Harrell, therefore, being the agent of the telegraph company at Quitman, was under the duty to exercise reasonable and ordinary diligence in transmitting the message, when he received it, to the operator at the telegraph company's office in Quitman. The evidence as to when Harrell received the message from Dr. Odum is in conflict. Harrell testified positively, refreshing his recollection by a memorandum on the carbon copy

of the message, that he did not receive the message from Dr. Odum until 10.20 o'clock Monday morning, and that he immediately called up the operator and informed him that he had the message, and requested him to send a messenger for it. Dr. Odum testified that he had transmitted over the telephone wire from Barney to Quitman the message to Harrell between 7 and 8.30 o'clock a. m., certainly not later than 10 o'clock Monday morning. This conflict in the evidence could only be determined by the jury. They had the right to accept as the truth the statement of Dr. Odum. Assuming, therefore, that Harrell received the message from Dr. Odum as late as 8.30 o'clock Monday morning, he was under a duty to use ordinary diligence in transmitting it to the operator at Quitman. The operator testified that he did not receive the message from Harrell until 10.30 o'clock. If Harrell received the message at 8.30 o'clock and delayed transmitting it to the operator at Quitman until 10.30, it was for the jury to say whether these two hours' delay was unreasonable and negligent. It was also for the jury to determine whether the prompt performance of his duty by Harrell in transmitting the message to the operator at Quitman and the proper exercise of diligence on the part of the operator in transmitting the telegram to the addressee, Dr. Jerkins, at Moultrie, would have enabled the latter to receive it in time to have gotten out to the plaintiff's home by 12 o'clock Monday, July 5. Moultrie is only 36 miles from Quitman. Unquestionably, if the message had been received by Harrell at 8.30, and he had at once transmitted it to the operator at Quitman, and the operator had used due diligence in transmitting it to the addressee at Moultrie, it would have been received in all probability before the office at Moultrie had closed on account of the legal holiday. If Dr. Jerkins had received the dispatch at 10 o'clock, according to his evidence he would have gone immediately to the home of the plaintiff, and would have reached her in an hour or so; and if he had reached her before twelve o'clock on that day, according to his opinion as an expert, there was a reasonable probability that by treatment he could have saved the plaintiff's eye. It is insisted that neither Harrell nor the operator at Quitman knew of the urgent character of the message, or of the critical situation of the plaintiff and the necessity for prompt transmission and delivery; and this view is sustained, so far as the operator is concerned, although there is some evidence that Harrell

had been urged by Dr. Odum to send the message promptly. We do not think, however, that this makes any material difference. Even without any knowledge of the urgent character of the message, it was a question for the jury to determine, under the evidence, whether the agents of the Western Union Telegraph Company at Quitman exercised ordinary diligence in sending the message which they had received, regardless of any knowledge of its urgency; and we are not prepared to hold that the jury would not be authorized to find that the delay of over two hours in transmitting the message from Quitman to Moultrie was an unreasonable and culpable delay. We therefore conclude that the jury were authorized, on this branch of the case, to find that the defendant telegraph company, through its agents, did not exercise ordinary diligence in transmitting and delivering the message to Dr. Jerkins, the physician at Moultrie, and that this delay prevented the physician from giving prompt medical treatment to the eye of the plaintiff.

What is said renders unnecessary any discussion of the sixth ground of the amended motion for a new trial.

2. The second question for determination is not free from doubt and difficulty. Was the negligent delay of the telegraph company in transmitting and delivering the telegram to the physician, whereby he was prevented from earlier attendance on the patient and medical treatment of the eye, the proximate cause of the loss of the plaintiff's eye? The general rule is that there must be some direct and proximate connection between the negligence or wrong done and the physical injury suffered, to warrant a recovery in damages, and this causal connection must be proved by facts based upon direct testimony, or the opinion of experts, and must not depend upon conjecture or guesswork. In this case there could be no recovery under the law, unless the evidence shows that it was reasonably probable that the plaintiff would not have lost her eye had the doctor reached her in time, after promptly receiving the telegram, and by proper treatment could then have saved the eye; and this evidence must have such probative value as to produce a reasonable conviction without resorting to mere conjecture, inconclusive inferences, or bare possibilities. *Western Union Telegraph Co. v. Ford*, 8 Ga. App. 514 (70 S. E. 65). It seems to us that sections 4509 and 4510 of the Civil Code (1910) embody, in a com-

prehensive statement, the rule of law on this subject: "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrong-doer." "Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. But damages traceable to the act, but not its legal or material consequence, are too remote and contingent." As pointed out by Judge Powell in discussing the question in *Glawson v. Southern Bell Tel. Co.*, 9 Ga. App. 455 (71 S. E. 747), the courts of this country are in wide disagreement as to whether damages which result through the failure to get a physician, so that the progress of a malady can be checked or the effects of a wound can be allayed, and injurious results prevented, are speculative and remote, within the meaning of the rules just quoted. Some courts go almost to the extent of holding that it is impossible, from a human standpoint, to say what would be the result of a physician's services in checking almost any known disease, or of relieving almost any imaginable physical hurt or injury. And in that case this court, following the rule laid down in the *Ford* case, *supra*, accepts the doctrine that the question is to be determined by the jury, and that in determining this question they can accept the opinion of experts.

If the jury in the present case were authorized to believe, from the testimony of Dr. Jerkins, that he could have saved the plaintiff's eye if he had reached her Monday morning by 12 o'clock, or if there was a reasonable probability that he could have saved her eye at that time by proper treatment, the standard of proof laid down by both the *Ford* and *Glawson* cases, *supra*, was reached. The evidence of Dr. Jerkins is not entirely satisfactory on this point, but, taking his evidence all together, we can not say that the hypothesis that he would probably have saved her eye if he had reached her in time is not fairly deducible. He testified that if he could have seen and treated the eye before 12 o'clock Monday, there would have been a reasonable probability that he could have saved it; and, from his opinion and experience as an expert, he states that 70 per cent. of eyes affected like this eye was, provided a physician could get to them and treat them within ten or twelve hours after the occurrence of the first premonitory symptoms of corneal ulcer

appears, could be saved. Of course, he was not positive that he could have saved this eye even if he had reached it early Monday morning. In the very nature of things he could not have been positive. This standard of proof is not possible to be reached in such cases, and we are compelled to make a decision within the limitations of human fallibility; and while, as stated, we are not entirely satisfied as to the character of the proof on this branch of the case, yet we do not feel that we would be justified in setting aside a verdict of the jury, under this evidence, which was approved by the trial judge. In other words, we can not say, as a matter of law, that the question is one purely problematical and speculative, and unless there is some prejudicial error in the conduct of the trial, we will leave the solution of this issue where the law places it, in the hands of a fair, impartial, and intelligent jury.

3. Error is assigned upon the ruling of the court in admitting in evidence the testimony of Dr. Jerkins as follows: "What percentage of eyes are saved, affected like this eye was, provided you get to them say within 10 or 12 hours after you feel the sharp pain that occurs?" The reply to this question was that the average would be 70 per cent. This evidence was objected to, on the ground that it was a matter of hearsay and not relevant to the issues in the case. Certainly the question was relevant to one of the two controlling issues in the case, and we think it was within the province of expert testimony. If based upon the experience of the witness as an expert, it would be admissible for that reason. If it was based upon the consensus of opinion of specialists, we think it would be admissible for that reason. The evidence is similar in character to that presented by statistics gathered by learned and experienced men, such as the average of life contained in mortality tables, and other kindred subjects.

4. At the conclusion of the plaintiff's evidence a judgment of nonsuit was invoked, on the ground that the contract between the sender and the defendant company contained, as a condition precedent to a right of recovery, a stipulation that the claim should be filed by the plaintiff against the company within sixty days after the filing of the message, and there was no evidence that this claim had been filed as required by this condition of the contract. This objection was met by proof that the plaintiff had filed within the sixty days a suit for damages against the defendant company, in

which her case was fully set forth; that this suit was withdrawn, and subsequently, within the legal limitation, the present suit for the same cause of action was filed; and it is insisted by the plaintiff that this was equivalent to a compliance with this condition of the contract. In answer to this position it is contended by the plaintiff in error that the suit first filed was not a compliance with this condition, and that certainly, when the suit was withdrawn or dismissed, it became *functus officio*, and was as though no claim had ever been made.

In our opinion the filing of this suit was a substantial compliance with this condition of the contract. *Postal Telegraph-Cable Co. v. Morse*, 5 Ga. App. 504 (63 S. E. 590). And we do not think that a subsequent temporary withdrawal of the suit destroyed the effect of the filing of the suit as a claim made against the company for damages. The first suit, filed within the sixty days from the time when the cause of action arose, had been served upon the company. They then had notice of the claim for damages, and the subsequent temporary withdrawal of the suit could not have taken away from the company the notice previously acquired by the filing and service of the suit.

5. The excerpts from the charge of the court, taken in connection with the entire charge, contain no material error. We think the charge as a whole clearly and distinctly instructed the jury that the standard of diligence required of the defendant company with reference to the transmission and delivery of the message was that of ordinary care, and we do not think that the jury could possibly have inferred, from the excerpts set out and objected to, that any higher degree of diligence was required from the defendant than that of ordinary care. It was not necessary for the judge to define the words "ordinary care," in the absence of a timely written request. They are self-explanatory, and it will be presumed that the jury understood the ordinary and common significance of these terms.

6. The assignments of error on the failure of the court to charge that Harrell was the agent of the plaintiff, and not of the defendant telegraph company, are fully covered by the second division of the opinion. The failure of the court to define to the jury the legal meaning of the word "agency," even if erroneous, was not harmful, in view of the fact that, as heretofore expressed

in the opinion, the undisputed evidence demanded the finding that Harrell was the agent of the defendant company in receiving and transmitting the message to the operator at Quitman.

7. The failure to charge the jury on the right to keep its office closed on legal holidays was immaterial, under the facts of this case. The jury were authorized to believe that the question of legal holiday was not relevant. The message was received by the agent, Harrell, and, in the exercise of ordinary diligence, could (at least the jury would have been authorized to so infer) have been transmitted and delivered during the hours when the offices both at Quitman and Moultrie were kept open, under the rules of the company, on legal holidays. Besides, the company accepted the telegram on a legal holiday, and was under the duty to exercise ordinary diligence, after having accepted it, to transmit and deliver it to the addressee on that day, notwithstanding the fact that the day was a legal holiday.

8. It is contended in the last ground of the amended motion for a new trial that the court erred in not restricting the right of recovery to damages for a partial failure of vision, since Dr. Jenkins's testimony, considered most favorably for the plaintiff, only bore the construction that, even if he had reached the plaintiff in time, he could only have partially saved the vision of the eye. The evidence of Dr. Jenkins on this point is not entirely clear; but he does state that there was a reasonable probability that if he had reached the plaintiff in time, her vision would have been preserved. He does not say whether this preservation would have been partial or complete, and the jury were authorized to draw the latter inference from his evidence, taken as a whole. The issue was not so clearly and distinctly made as to have demanded from the court a pertinent charge, without a timely written request.

After giving the entire case a most careful consideration, we fail to discover any error of such a material character as would warrant the grant of another trial.

Judgment affirmed. Pottle, J., not presiding.

3505. REGISTER *et al.* v. THE STATE.

1. No question for determination by this court is presented by a ground in a motion for a new trial, alleging error in admitting certain testimony over the objection of the defendant, where it affirmatively appears from the ground that no reason was presented to the court in support of the objection, and that no ruling was made thereon. *Soell v. State*, 4 Ga. App. 337 (61 S. E. 514); *Phillips v. State*, 102 Ga. 594 (27 S. E. 699).
2. The fact that a person accused of crime voluntarily surrendered to the sheriff and made no attempt to escape can not be proved by him in his own behalf. *Lingerfelt v. State*, 125 Ga. 4 (2), (53 S. E. 803, 5 Ann. Cas. 310), and authorities there cited.
3. Articles of wearing apparel, claimed by the accused to have been worn by him at the time of the difficulty, and evidencing by their physical condition that an assault had been made upon the accused by the deceased, are not admissible in evidence in behalf of the accused when their identification rests solely upon his statement to the jury. Proof of genuineness and identification of documents must be made by relevant testimony, as a condition precedent to their introduction in evidence. *Nero v. State*, 126 Ga. 554 (55 S. E. 404).
4. On the trial of an indictment for murder the judge gave the jury instructions relating to the law on murder, voluntary manslaughter, and justifiable homicide in self-defense. He did not instruct them on the law of involuntary manslaughter. The jury, after deliberation, returned a verdict finding the accused guilty of "involuntary manslaughter," and this verdict was read and published in open court as their verdict. There was no intimation by any member of the jury that the instructions of the judge on the law of the case had been misunderstood, no further instructions were asked, no member of the jury dissented from the verdict, and nothing occurred tending in any manner to show that the entire jury did not deliberately intend the verdict published in court as their unanimous finding. The judge refused to receive the verdict of involuntary manslaughter, telling the jury that the court could not receive the verdict which they had attempted to return, that the court had not charged them upon the law of involuntary manslaughter, and to return to their room for further deliberation. *Held*: (1) The verdict of involuntary manslaughter was in legal effect a verdict finding the accused guilty of the highest grade of involuntary manslaughter, and operated as an acquittal of the higher grades of homicide, that is, murder and voluntary manslaughter, as charged in the indictment. (2) The verdict of involuntary manslaughter was a finality, unless objected to in some form by the accused, and the judge could not legally refuse to receive the verdict, or to restrict in any manner the exclusive right of the jury to find and return the verdict, and the action of the judge in refusing to receive the verdict and in requiring the jury to return to their room for further deliberation was unauthorized by law.

DECIDED NOVEMBER 20, 1911.

Conviction of manslaughter; from Colquitt superior court—Judge Thomas. May 20, 1911.

W. A. Covington, James Humphreys, Edwin L. Bryan, Claude Payton, for plaintiffs in error.

J. A. Wilkes, solicitor-general, Shipp & Kline, contra.

HILL, C. J. The rulings stated in the first three headnotes do not require elaboration. The question of law dealt with in the last headnote, being novel, important, and interesting, justifies, if it does not demand, elaboration. The accused were on trial for murder. The jury, after having been out for some time considering their verdict, came into court and announced that they had agreed upon a verdict. This verdict was read by the solicitor-general, and was as follows: "We, the jury, find the defendants, B. L. Register and C. C. Register, guilty of involuntary manslaughter. E. L. Bacon, foreman. This April 13th, 1911." The judge refused to receive this verdict, or allow it to be filed, and directed the jury to return to their room for further deliberation, stating to them that the court could not receive the verdict which they had attempted to return, and that the court had not charged them upon the law of involuntary manslaughter. Counsel for the defendant, immediately after the jury had returned to their room, asked that the judge charge the jury as to the grades of involuntary manslaughter, and reduced the request to writing; and the court refused to give the instructions requested, or to charge the jury upon the law of involuntary manslaughter. The judge had the jury brought back into the court-room, and the following colloquy took place between the court and one of the jurors: The court: "I just called you out, gentlemen, to see what the trouble was, if any,—if there was any way in which the court could help you as a matter of law. Of course the facts, the court could not intimate any opinion as to these." Juror: "We want to know as to the degrees in this manslaughter." The court: "I don't quite understand the inquiry, gentlemen." Juror: "We want to know whether or not there was more than one kind." The court: "I gave in charge instructions as to voluntary manslaughter. What is your inquiry now, Mr. Foreman?" Juror: "We wanted to know if there was more than one kind, that is, involuntary manslaughter." The court: "The court gave you instructions with reference to voluntary manslaughter. The court did not give you any instructions with reference to involuntary manslaughter." Juror: "That is all." After this the jury retired, and brought in a verdict of guilty of voluntary manslaughter. The

motion for a new trial alleges that this was error, (1) because the accused had the right to have the first verdict filed, it being the verdict of the jury in the case, and it being the intention of the jury to give the defendants the benefit of the lower grade of punishment provided for the crime of involuntary manslaughter; and that the legal effect of such verdict was that the defendants stood guilty of the involuntary killing of a person while engaged in the commission of an unlawful act, the heaviest punishment for which is three years in the penitentiary; and (2) because the defendants were entitled to have the jury charged as to the two grades of involuntary manslaughter, the jury having stated that the intendment of their verdict was to reduce the grade of punishment, and, by refusing either to allow the verdict or to charge the jury upon the law of involuntary manslaughter, the presiding judge deprived the jury of their rights as jurors, and forced them to return the verdict of voluntary manslaughter, which was thus not a free expression of the sworn opinion of the jury, and, therefore, not a legal verdict.

The form in which this question is raised is probably not technically correct. It should have been made by direct exception at the time of the action of the court in refusing to receive the verdict of involuntary manslaughter and directing the jury to return to their room for further consideration, or by an exception contained in the final bill of exceptions. But regardless of the manner in which the question is raised, this court thinks that the question as presented in the motion for a new trial is of such character as to demand a decision, as, in our opinion, the question lies at the very foundation of the right of jury trial.

It is interesting to note that the question here made has never before, except on one recent occasion, occurred in the history of criminal trials in this State. The previous occasion referred to was in the case of *Darsey v. State*, 136 Ga. 501 (71 S. E. 661), in which the judgment of the trial court was affirmed by operation of law, the Justices of the Supreme Court being evenly divided in opinion. In that case the question, although identical as to principle, was presented somewhat differently to the Supreme Court from the manner in which the question is presented to this court in the present case. The *Darsey* case was an indictment for murder. The trial judge instructed the jury on the law of murder and the law of voluntary manslaughter and the law of justifiable homicide, and as to the

form of their verdict in each event. The court did not instruct the jury as to the law of involuntary manslaughter. The jury nevertheless returned a verdict in open court, which was received by the clerk and published, finding the defendant guilty of the offense of involuntary manslaughter. The judge refused to receive this verdict and instructed the jury that he had not charged them on the law of involuntary manslaughter, and to retire and find a verdict, and further instructed them to strike from the indictment the verdict of involuntary manslaughter, stating that it was not proper and in legal form. The jury returned to their room, and, failing thereafter to agree upon a verdict, the court, over the objection of counsel for the accused, declared a mistrial. Counsel for the accused insisted that the jury had already found the defendant guilty of involuntary manslaughter; that the verdict had been published; that it was a legal verdict finding the defendant guilty of the highest grade of involuntary manslaughter, and that the court had no power in such case to declare a mistrial. It may be also stated that counsel for the accused, when the court refused to receive the verdict of involuntary manslaughter and directed the jury to return to their room, objected to this action of the court and insisted on a reception of the verdict. When the case was again called for trial the accused filed a plea of former conviction and former jeopardy, and, on an agreed statement of facts, this issue was presented to the presiding judge, who decided the issue in favor of the State, and the defendant excepted. On the question as thus presented, the Supreme Court, as before stated, divided equally, Justices Lumpkin, Beck, and Atkinson being of the opinion that the decision of the trial judge was error, and that the plea should have been sustained, and Chief Justice Fish, Presiding Justice Evans, and Justice Holden being of the opinion that the court did not commit an error in overruling the plea of former jeopardy, as the allegations therein were insufficient as a bar to further prosecution of the case.

It was insisted, in the argument of learned counsel for the defendant in error, and also in the brief filed in this court, that the judgment in the *Darsey* case is binding on this court on the question now raised. We do not concur in this view. By the constitutional amendment creating this court, "the *decisions* of the Supreme Court shall bind the Court of Appeals as precedents." But in the *Darsey* case the court did not make any decision. The Justices of the

court divided evenly as to what decision should be made, and by operation of law the *judgment* of the lower court was affirmed. This by no means constitutes any decision of the Supreme Court. It is simply an affirmance of the judgment below as to that particular case, and does not amount to a decision of the Supreme Court, and the opinion of one half of the Justices of the Supreme Court is entitled under the law to no more weight with this court than the opinion of the other half, and the fact that the judgment of the trial court strikes the balance in favor of the affirmative has no legal effect whatever as precedent or authority. Of course it is desirable that there should be no conflict, real or apparent, in the decisions of this court and those of the Supreme Court, and the decision by this court on this question will present no conflict, but the question is before this court, and the plaintiff in error is entitled to a decision of the question, and this decision this court, in the discharge of its duty under the law, is obliged to render. A majority of the court is clearly of the opinion that the ruling of the trial court on this point was erroneous, and that the motion for a new trial should have been granted because of this error.

The fundamental law of this State declares that "the jury in all criminal cases shall be the judges of the law and the facts." Constitution, art. 1, sec. 2, par. 1 (Civil Code (1910), § 6382). And this has always been the law in this State. In the earlier decisions the Supreme Court held that this provision of law meant that the jury were judges of the law even to the extent that they could determine the law to be different from that given in the judge's charge. In the case of *Ricks v. State*, 16 Ga. 600, after quoting from the Penal Code as follows: "On every trial of a crime or offense contained in this Code, or for any crime or offense, the jury shall be judges of the law and the fact, and shall in every case give a verdict of 'guilty' or 'not guilty'; and on the acquittal of any defendant or prisoner no new trial shall, on any account, be granted by the court," the court says: "The meaning of this plainly is, that it is the jury and not the court—the jury whose right and whose duty it shall be, to be the judges of both what the law is and what the fact is; that is to say, whose right and whose duty it shall be to judge—to decide both what the law is and what the fact is; and that after having judged, decided what the law is, and the fact is, they shall give their judgment—their decision in the form of

a general verdict of 'guilty,' or 'not guilty.'" In these earlier decisions it is held that if the jury can not conscientiously adopt the law as it is given in the charge of the court, it is not only their *right*, but their *duty*, to render a verdict according to the opinion which they entertain of the law. This was the uniform holding of the Supreme Court in the ante-bellum period. The decisions are collated in 4 Michie's Encyclopedic Digest of Georgia Reports, 37. The interpretation now made by the Supreme Court of this provision of the law is that while jurors are judges of the law as well as of the facts in criminal cases, they must accept the law as laid down and expounded to them by the presiding judge. Beginning with the ruling in the case of *Brown v. State*, 40 Ga. 689, this has been the uniform interpretation of this law by the Supreme Court to the present day, and we may consider the law as now settled that in the trial of criminal cases it is the *duty* of the jury to *take the law from the court*, as it is their duty to take the evidence from the witnesses.

But suppose the jury disregards its duty in a criminal case and returns a verdict outside of the law as expounded by the judge, and without any evidence to support it as given by the witnesses, what would be the effect of such a verdict? The accused has a statutory remedy. He can file a motion for a new trial and have the verdict set aside, because contrary to law, or without any evidence to support it. But what can the State do? It certainly can not have such a verdict set aside on motion for a new trial, for in no case can the State file such a motion, and no new trial shall on any account be granted by the court at the instance of the State. What the State can not do directly, the trial judge can not do for the State indirectly. If a verdict of acquittal is a complete bar to any further prosecution, the court has no authority to continue any further prosecution of the case after the verdict of acquittal by the jury. It is wholly immaterial whether the verdict is supported by the evidence or by the law. If a verdict found by the jury is included within the crime as charged by the indictment, and is in form correct and explicit, the court is powerless to change it. The court is powerless to direct the jury to change it after it has been published. It stands forever as a protection to the accused and as a complete bar to any further prosecution for the same transaction. In the case of *Kitchens v. State*, 41 Ga. 217, Judge McCay

uses the following language: "If the jury fails to heed the charge of the judge and finds the prisoner guilty, the court is authorized to grant a new trial. If the jury fails in favor of the prisoner and find him not guilty, although there is no remedy for the error, it is none the less a wrong." The learned Judge holds that this would be a wrong in the jury because it would be their duty to receive the law from the judge, but if their failure to do so operates in favor of the prisoner, the conclusion is, notwithstanding the wrong, that there is no remedy for its correction. It can not be doubted that an acquittal of the accused would operate as a complete bar to any further prosecution, however much the acquittal might be against the evidence and the law. Where the trial is for murder and the verdict is for an inferior grade of homicide, this is in legal effect an acquittal of all the higher grades of the crime. *Jordan v. State*, 22 Ga. 559.

In this case the verdict of involuntary manslaughter which was found by the jury in the first instance was an acquittal of the defendants of all the higher grades of the homicide, and must be treated as equivalent to a finding that the defendants were guilty of involuntary manslaughter in the commission of an unlawful act. *Thomas v. State*, 121 Ga. 331 (49 S. E. 273). "When only a minor offense is found, the finding, unless set aside at the prisoner's instance, is a full and complete acquittal of the major offense charged." *Miller v. State*, 58 Ga. 203. Of course, where a verdict is not in proper form, or where it is uncertain what the jury intended to find by their verdict, or where that verdict is for an offense not covered by the indictment, the judge may send the jury back for further consideration of the case. *Cook v. State*, 26 Ga. 593; *Mangham v. State*, 87 Ga. 552 (13 S. E. 558). But if the verdict is explicit and is included in the charge set out in the indictment, and if it appears to be the deliberate and intentional finding of the jury, though it may be in the very teeth of the charge and wholly without any evidence to support it, the court is obliged to receive it; and to refuse to do so is, in the opinion of a majority of the court, under the law of this State, an unwarranted invasion by the judge of the exclusive province of the jury. Mr. Bishop, in his work on Criminal Procedure (2 New Cr. Proc. § 642), uses the following language: "A verdict contrary to instructions, for a less degree of the offense than the evidence proves, must be received

and carried out. Certainly there is no higher duty on the jury to observe the instructions of the court than there is upon the jury to find a verdict according to the truth in the evidence." Proffatt, in his work on Jury Trials (§ 467), in discussing the conclusiveness of a verdict, lays down this principle as without any exception: "In one instance a verdict is final; that is, in case of a verdict of acquittal. Whatever errors may have been made by the jury in the application of the law, or however perversely they may have acted, and in defiance of the plain and positive instructions of the court, their verdict of acquittal in a criminal case is final. The court can not set it aside for any error of law, or any disregard of the evidence. While in case of a conviction the prisoner has a right to have the action of the jury reviewed, in case of acquittal no such right is given to the people. It is for this reason, no doubt, that the doctrine has been maintained, that in criminal cases the jury are the judges of the law and fact." And Mr. Bishop, further discussing the principle, uses the following language: "If, obeying their own conscience and disobeying the judge, they [the jury] return a verdict of acquittal, he can neither punish them nor set the verdict aside, though he can set aside a conviction. This power of granting a new trial, therefore, furnishes no reason or test of the rights of juries. They can not convict a defendant contrary to the direction of the court, but they may acquit him in like disobedience whenever their own judgments demand. The judge may in his charge convey to them his ideas of their duties, but the law restricts him from interposing with his power." The great Mansfield declared: "It is the duty of the judge, in all cases upon general issues, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter between God and their own consciences." 3 T. R. 428, note 9.

In a criminal case, therefore, we conclude that while it is the duty of the jury to take the law as given them in charge by the court, and the evidence as presented to them by the witnesses, yet if they take the law and the evidence into their own hands and find a verdict explicit as to form and intention, and included within the crime charged in the indictment, the finding is within their power as it is written in the law, and the verdict is an absolute protection from any subsequent prosecution for the same transaction, whether or not that verdict is received formally and filed by the court; and the

court has no power to nullify or set aside the verdict of the jury by refusing to receive it and have it filed in such case. In other words, after a verdict of the character above described in a criminal case has been found by the jury and published in court as their verdict, the judge has no right, under the statutes of this State, to take issue with the jury as to the legality of that verdict, or to get up any controversy with the jury as to whether the verdict is contrary to law or without any evidence to support it, or to coerce them to any further consideration of their verdict. Now, in this case, the indictment being for murder and the jury having found a verdict of involuntary manslaughter, which is embraced in the charge of murder, and that verdict having been returned into court and published by the jury as their verdict, and there being no objection by any member of the jury that the verdict was not the verdict of the twelve jurors, the court had no right to send the jury back for any further deliberation. It is wholly immaterial whether this verdict was in obedience to the instructions of the court, or was in accordance with the evidence in the case. It was the finding of the exclusive arbiters on the question of the defendants' guilt or innocence, and the reception of this verdict and its filing of record was a mere matter of formal procedure, and did not in any manner affect the substantial rights of the accused as fixed by the verdict; and the most substantial right was that they were acquitted by this verdict of all the superior or higher grades of the crime charged against them; and it seems to the majority of this court that it would be to overthrow the very foundation of the right of trial by jury and to place the entire matter into the hands of the trial judge, both under the law and the evidence, to permit the judge in such case to send the jury back for further consideration of their verdict.

In *Fagg v. State*, 50 Ark. 506 (8 S. W. 829), the accused was tried on an indictment for murder, and the jury found the following verdict: "We, the jury, find the defendant guilty of manslaughter, but can not agree upon his punishment." In Arkansas the statute, as in this State, makes two degrees of manslaughter, voluntary manslaughter and involuntary manslaughter. The judge, in sentencing the defendant, treated this verdict as one of voluntary manslaughter. The appellant contended that the killing was either murder in the first degree, or justifiable homicide, and therefore that the jury could not legally return a verdict of manslaughter.

In the course of the opinion the Chief Justice says: "Where the evidence and the instructions of the court demand a verdict of murder, but the jury finds manslaughter, there is no alternative but to sentence the prisoner accordingly. The court can not withhold from the jury the power to return a verdict according to their will for any grade of the offense charged against the defendant. The court can only instruct juries as to their duty, giving them in charge the law applicable to the facts, and no other. If there is no evidence whatever tending to establish a lower grade of homicide than murder in one instance, or voluntary manslaughter in another, the court should decline to give to the jury directions as to any lower grade of homicide, and it is the jury's duty to take the court's exposition of the law as that applicable to the case. But the court can not direct a verdict for the higher offense, nor restrain the jury from returning it for the lower grade." One of the headnotes applicable to this point is as follows: "On the trial of an indictment for murder, although both the instructions of the court and the evidence call for a conviction of the highest grade of the offense charged, there is no power to restrain the jury from returning a verdict of manslaughter; and in such case the accused must be sentenced according to the finding of the jury."

To refuse to receive the verdict in a criminal case, on the ground that the verdict is for a grade of the offense charged in the indictment but not covered by the instructions of the court, and without evidence to support it, is to restrict the exclusive right of the jury in their finding of a verdict to that view of the law and the evidence entertained by the trial judge, and in its last analysis is destructive of the right of jury trial. And certainly, in a State where the statute deprives the judge of the right to intimate any opinion on the facts, and makes such intimation of opinion a mandatory ground for a new trial, the refusal of the trial judge to receive a verdict is, although indirect, a very strong method of informing the jury that the trial judge entertains a different opinion from that entertained by the jury on the evidence as applicable to the law. In the case of *Grant v. State*, 33 Fla. 291 (14 South. 757, 23 L. R. A. 723), the indictment was for murder, and the jury brought in a verdict of manslaughter in the first degree. The judge refused to receive this verdict and stated to the jury in effect that it was defective, as there were no degrees in manslaughter, and

that they must retire and present a verdict in proper form. In discussing the right of the judge in that case to give such direction, the Supreme Court said: "The direction was to retire and present a verdict in a proper form. There is nothing here to indicate the character of the verdict to be returned, except that one for manslaughter in the first degree was not in proper form. If there was any error on the part of the judge, it was in refusing to receive the first verdict as presented, and in not proceeding to affirm it in the proper way. It is of course true that when a complete formal verdict is returned by the jury, the court has no discretion in the matter, but must proceed to affirm it." In the case now under consideration no objection was made as to the form of the verdict, but the objection, in effect, was that the verdict was unauthorized by the evidence and the law applicable thereto, as covered by the instructions of the court, and the jury was directed not to change the form of the verdict, but to retire and consider the question of evidence, according to the instructions of the court. In other words, the court, in effect, told the jury in the present case that their verdict for involuntary manslaughter was without any evidence to support it, and was contrary to his instructions as to the law applicable to the issues made by the evidence.

In the case of *Spence v. State*, 7 Ga. App. 825 (68 S. E. 443), this court held that on the trial of an indictment for murder the jury may convict of any lesser grade of homicide, and a verdict of voluntary manslaughter in accordance with the evidence would be a legal verdict, although the court did not instruct the jury on the law of voluntary manslaughter. A majority of the court in the case sub judice go even further than the decision announced in the *Spence* case, and entertain the view that a verdict for a lower grade of homicide on the trial of an indictment for murder is binding upon both the trial judge and the State, and can not be set aside or avoided except at the instance of the accused. As before stated, a verdict of guilty of a lesser grade of homicide than that charged in the indictment is an acquittal of the higher grade. To allow the judge to refuse to receive it is to allow him to refuse to permit the jury to acquit of the higher grade of homicide because the verdict is not sustained by the evidence as the judge views it. The fact that the State can not except to a wrong verdict and the defendant can do so is immaterial and furnishes no answer to the

argument. This is true of every error, either of law or fact, in criminal cases, for no error against the State can be corrected, while any error against the accused can be corrected. This arises from the general rule that no one can be twice put in jeopardy, under the constitution of this State, unless the verdict is set aside on his own motion, or by the direction of a mistrial in a proper case. Civil Code (1910), § 6364. What is here held is, we think, not in conflict with the well-settled rule that the trial judge is not required to charge any part of the law which is not in his opinion applicable to the evidence; and the refusal of the court in this case to charge the law of involuntary manslaughter was not erroneous, under the evidence, but the refusal to receive a verdict which was clear and explicit in its terms, of a lower grade of homicide embraced in the charge made by the indictment, and sending the jury back with instructions to resume their consideration of the case, was, in the opinion of a majority of this court, error, and in its last analysis would tend to destroy the right of trial by jury, and to place in the hands of the trial judge the exclusive determination of the ultimate guilt or innocence of the accused.

We have not referred to the colloquy between the judge and the jury subsequently to the return of the verdict of involuntary manslaughter, and the absolute refusal of the judge to receive the verdict, and his direction to the jury to retire and resume their deliberations. If we are right in the view presented, that the verdict of involuntary manslaughter was, under the circumstances stated, a final verdict, and it was the duty of the court to receive it, the subsequent action of the court was wholly immaterial. We think, however, that a fair deduction from the language used by the jury in reply to the judge's inquiry was an expression of a desire to adhere to the verdict of involuntary manslaughter, if there was such a grade of homicide, and they were prevented from doing so because the judge declined to answer their inquiry, except by telling them that the court had "given instructions only as to voluntary manslaughter." This was equivalent to telling the jury that so far as the evidence in this case disclosed, there was no such offense as involuntary manslaughter. It will be noted that the judge's refusal to *receive* the verdict of involuntary manslaughter was not on the ground that the verdict was imperfect or incomplete in that it did not clearly express the intention of the jury on the grades of

involuntary manslaughter, whether the jury intended to find the accused guilty of involuntary manslaughter in the commission of an unlawful act, or involuntary manslaughter in the commission of a lawful act without due caution and circumspection; but the refusal was placed squarely on the ground that the jury had found a verdict contrary to his instructions. We think the judge was authorized to assist the jury in making the verdict explicit as to the degree of involuntary manslaughter, but he could not intimate what sort of verdict the jury should find. *Turbarille v. State*, 58 Ga. 546 (3). His refusal to explain the grades of involuntary manslaughter after the jury had found a verdict for this offense, and when they requested him to do so, and he insisted in effect that they could only consider the offense of voluntary manslaughter, approached near, if it did not actually reach, an intimation of opinion on the subject. The jury ought to have followed the instructions of the judge as to the law. It was wrong for them to disregard these instructions, just as it would be wrong to find a verdict not supported by the evidence; but if the wrong is perpetrated by the jury against the law, or against the weight of the facts, in the language of Judge McCay, "the wrong is without remedy," except at the instance of the accused; and in the words of Mansfield, it "is a matter between God and their own consciences."

Suppose the jury in this case, after the refusal of the judge to receive their verdict, had persisted, and again returned the same verdict, could the judge have legally declared a mistrial? Would not the accused have been protected from any subsequent trial by the plea of *autrefois convict*, if the judge had declared a mistrial? Suppose the judge had said to the jury, when they brought in their verdict of involuntary manslaughter: "Gentlemen of the jury, you have found a wrong verdict, one wholly without evidence to support it and in the teeth of my instructions on the law, and I therefore set it aside, and direct that you retire to your room and resume your deliberations," would this not have been a clear invasion of the exclusive province of the jury? Is there any substantial difference in this supposed action of the judge, and what was done in this case?

Judgment reversed.

POWELL, J., dissenting from the ruling in the 4th paragraph of the syllabus and the corresponding matter in the opinion.

There may have been a day when the proposition laid down in the

majority opinion would not only have been sound from a logical standpoint, but would have been consistent with the general scheme of jurisprudence then in force. In my opinion that day is past, and, if not wholly past, is passing; and I would do nothing to protract its stay.

A court is defined as "a place where justice is judicially administered." The chief task of all our ingenuity is and should be to make our courts efficient to this end of administering justice. Harmony is a *sine qua non* of efficiency. Courts give better justice now, and administer it more judicially, than they did in earlier times, because more certain and harmonious methods of trial than were then known have been devised. In no phase of the general question has more improvement in this respect been obtained than has come about through the progress which has been made in defining the respective functions of judge and jury as they are called upon to co-operate in the trial of a case.

Irrespective of all older views and judicial announcements on the subject, the modern view and the present rule are conceded to be that the judge is charged with the function of deciding all questions of law in the case, and the jury with the function of deciding all questions of fact; and beyond this, wherever a general verdict is required, as it is in a criminal case, the jury is charged with the further duty of applying the law as decided by the court to the facts as found by the jury. Further progress has been made in this State by the working out of the proposition that the determination of what issues are involved in a case is a question of law, for the court to decide. For instance, though the question as to whether the defendant is guilty of manslaughter may be a possible issue under an indictment for murder, it is error for the court to submit that issue to the jury, where there is no evidence of that character of homicide which constitutes manslaughter; and it is proper in such a case for the court to tell the jury that they should not consider that subject. This proposition has been established by repeated decisions, the majority opinion concedes it, and I need not elaborate it.

Not only is it the duty of the judge to decide the law, but it is his duty to tell the jury how he has decided it, and it is his duty to see that his decision is obeyed and respected, so far as may be in his power. For instance, suppose a writing were offered in evidence

and the court rejected it, and later, after submission of the case to the jury, they should file in and say to the court: "We are judges of the facts; we demand to see that writing, which we deem is relevant to the facts as we see them." Would it be any infringement upon the sacred prerogative of the jury for the judge to tell them, in language howsoever emphatic, that they could not see the paper, and should not consider it in making their verdict? On the contrary, it would be his duty to do so.

There are a number of decisions of our Supreme Court (and they are referred to with approval in the majority opinion, though as to them my colleagues find a distinction which my mind does not make) to the effect that if the jury offers a verdict for some offense not included in the indictment, the court should decline to receive it. By what right does the court decline to receive such a verdict? It is for no other reason than that such a verdict is not responsive to any issue in the case; and it is the right and duty of the court to see that the verdict is responsive to the issue, or to one of the issues submitted. If the jury (though in a certain sense judges of the law and of the facts) differ with the judge and believe that they have the right to return a verdict for some misdemeanor, say assault and battery, upon an indictment charging a felony, say arson, it is the jury, and not the judge, that must yield. If the judge should receive such a verdict, it would operate to acquit the defendant of the arson, and it would in all respects be equivalent to a verdict of not guilty of that offense; and yet, because the jury thus offer to express themselves in a formulated finding, as if it were a true verdict, should the court receive it? No. And this is an answer in which both reason and precedent heartily concur. And from the correctness of this answer my colleagues offer no dissent.

Now, take a step further, keeping in mind as we go that the determination of what the issues in a case are depends upon a consideration of both the pleadings and the evidence. An indictment charges murder. There is evidence of a homicide, but nothing whatever to show (what it is necessary to show, in order to convict of involuntary manslaughter) that the killing was negligent but unintentional; indeed, the defendant concedes an intent to kill, but pleads justification. The judge, charged with the duty of framing the issues on which the jury must pass, decides, and correctly decides, that there is no issue as to involuntary manslaughter in the

case, and, as is his duty and privilege, he so informs the jury. Nevertheless, the jury, disagreeing with him (as they did in the supposed case of arson discussed just above), offer to return a verdict of involuntary manslaughter. Shall the judge receive it, or shall he direct the jury to return to their room and bring a verdict responsive to the issues submitted to them? It is true that the verdict of involuntary manslaughter, if received, would operate to acquit the accused of the murder and of the voluntary manslaughter, if any, and indeed of all other offenses, if any, so far as the transaction charged in the indictment is concerned; just as a verdict of assault and battery, if received, on an indictment charging arson, would acquit the accused of that offense; but the question is not as to what would be the effect of the verdict if the court should receive it, but as to whether the court should receive it notwithstanding its lack of responsiveness to any issue in the case, accordingly as those issues have been determined by the judge in pursuance of his unchallenged prerogative of framing the issues. My associates draw a distinction between the two cases, and say that though the judge should not receive the unresponsive verdict in the arson case, he can not legally refuse to receive the unresponsive verdict in the murder case; while to my mind there is no rational distinction to be made. And it seems to me not only logical, but eminently proper, and consistent with all the better notions as to how justice should be judicially administered, efficiently administered, that in such a case the judge should stand his ground and compel the jury to tender a verdict responsive to the issue as he in the due exercise of his prerogative has framed it, or else make a mistrial.

I fully agree to the proposition that the judge must not transgress upon the prerogative of the jury. I, with equal alacrity, agree that trial by jury is a well-established right, high and valuable in its nature. But my point is that trial by judge (meaning thereby that the judge shall perform those functions in the trial of the case which are his to perform, according to the recognized division of duties) is to my mind a right no less firmly established, a right no less important in its nature, than trial by jury. Trial by court, that is by both judge and jury, with each legitimately performing only the particular function given by law, is the kind of a trial that most commends itself to right thinking and to the highest sense of jus-

tice, and that best accords with the spirit of our law and with the principles of modern jurisprudence.

It is no less a wrong for the jury to invade the province of the judge than it is for the judge to invade the province of the jury. If a judge, forgetting his duty, should undertake to invade the province of the jury and to express his opinion on the facts, the jury should disregard it and should refuse to follow his opinion, unless it accords with their own. On the other hand, if the jury undertakes to invade the province of the judge, and to inject into a case an issue which the judge has decided is not in it, the judge should likewise repel the invasion of his province, and, in the discharge of his function as the head of the court, directing the progress of the trial, should compel the jury to keep its place, and either to render a verdict on some issue submitted or else make a mistrial.

It is said that if this proposition were recognized to its logical end, a judge might direct a verdict in a criminal case, where the facts were undisputed. Perhaps this may be a logical extension of the doctrine (though I do not concede that it is); but even if it were, still, it is to be remembered that we carry few, if any, of our legal doctrines to their full logical end in actual practice. This is true with courts just as it is with men in other activities. From the standpoint of strict logic, we might say that no sensible man would ever eat food that he knows is likely to disagree with him; and yet, in actual practice, sensible men do that very thing every day. But, be that as it may, every criminal case contains the issue of guilty or not guilty of the offense charged, and the jury must believe the evidence, howsoever strong and uncontradicted, before they are compelled to render a verdict of guilty. The jury may reject evidence, but they can not supply it where it does not exist. And it must be kept in mind that the verdict which the judge refused to receive in the present case is one which could not be rendered upon a rejection of testimony; it depended upon the jury's supplying certain facts of which there was no evidence.

Let us elaborate this last proposition slightly. The indictment charged murder—a homicide committed by shooting with a pistol. No matter how conclusive of that offense the testimony as delivered might have been, the jury might have disbelieved it, and could have rendered a verdict of not guilty without going beyond their legiti-

mate function and without transgressing upon the function of the judge. But the verdict offered was for involuntary manslaughter. Now this is an offense which can not exist in the absence of a certain affirmative characterizing element, namely, an intention to do some unlawful act other than to kill; and, as was pointed out in *Maughon's case*, 7 *Ga. App.* 660, 665 (67 S. E. 842), this unlawful act cannot be shooting at another; for, though a person shoot at another not intending to kill, still if death ensues, it is nevertheless murder, under the express provision of § 67 of the Penal Code of 1910. So the jury in this case could not, by rejecting the testimony, or by rejecting a part of it and giving weight to the rest of it, find anything to supply this affirmative element essential to the existence of involuntary manslaughter. The jury had no power to go outside of the evidence to find this affirmative element; hence, by no possibility was it included within the range of any issue before them for decision.

In this connection it is well enough to draw attention to a difference between the modern and the earlier functions of juries. The day was when the jury had the right to act on the private knowledge of its members. From our studies in the history of the English law we learn that in the earliest times juries acted solely on what they knew of the case or of the parties; later they might hear witnesses, but could still legally use their personal knowledge; but now our Civil Code (1910), § 5932, provides, "A juror should not act on his private knowledge respecting the facts."

In the days when jurors could legally act on their private knowledge of the facts, it would have been improper for a judge to refuse to receive from the jury a verdict of any offense which by legal possibility could be included within the charge stated in the indictment. When that was the rule, every grade and degree of murder and manslaughter, as well as a number of minor offenses, was necessarily in issue when the accused pleaded not guilty to an indictment charging murder; for even though no issue of fact as to some of these offenses should arise under the testimony, the court could not say that such an issue had not arisen by reason of some matter resting within the private knowledge of the jurors. This is no doubt the rationale underlying many of the old precedents wherein the right of a judge to refuse a verdict not responsive to the issues made by the evidence is denied. Certainly this is the avowed

reason for the abrogation of the ancient practice under which judges punished jurors who brought in a verdict which, according to the testimony as submitted, was necessarily false. So long as jurors might act upon private knowledge, the judge could not frame the issues except in so far as they were dependent upon the scope of the pleading. Now that the right of jurors to act upon private knowledge has been taken away, there is no longer any legal difficulty in the way of the judge's framing the issues in accordance with both the pleading and the evidence. It has become not only his right, but his duty to do so. And in my judgment, he no more infringes upon the prerogative of the jury when he refuses to receive a verdict entirely beyond the fullest possible range of the evidence than when he refuses to receive a verdict beyond the fullest possible scope of the pleading.

If the jurors, acting within their appropriate sphere, find an untrue verdict upon some issue submitted to them, that is a matter which the judge can not avoid, so far as the trial itself is concerned. (It is to be seen that I am now drawing the distinction between the powers of the judge at the trial, and the powers of the judge on motion for a new trial; for the two functions are different and need not be exercised by the same person.) Whether a verdict is true or not is an issue of fact which the judge (on the trial) has no power to decide; he therefore can not refuse to receive a verdict because it is not true. Whether a verdict is responsive to the issue submitted to the jury is a question of law; and hence, to that extent, the judge may control the verdict as to this, just as he may control it as to matters of form, as to the method in which it shall be received (that is to say whether in open court or at recess), and as to how it shall be published (that is to say, whether by the oral announcement of the foreman, or in writing signed by the foreman, or on a poll of the entire jury).

After a verdict has been received, the power and the function of the judge are very different, both as to extent and as to limitations, from what they were on the trial. (I mention this because in the majority opinion reference has been had to the decisions which declare that the court can not set aside a verdict in a criminal case except on motion of the accused.) If, after the trial, the court is called upon to deal with or set aside a verdict, the judge alone constitutes the court. He considers and, within certain limi-

tations, passes on questions both of law and of fact. But before this jurisdiction can be exercised, it must be invoked in the way prescribed by law. In that way only the accused can invoke it; the State can not move. This proposition is in nowise involved in the question as to what are the respective provinces of the judge and of the jury on the trial of the case. It is not out of deference to the jury or to any right of trial by jury that the State is denied the right to move to set the verdict aside; the State is just as remediless to except if the accused is discharged by some act of the judge. How far a judge may take steps, pass orders, and give directions, in order to bring the case to a legitimate end so far as the trial is concerned, is a very different proposition from the proposition as to when and how he must act in order to review and correct an erroneous finding, verdict, or judgment which has already been rendered. The two things stand on so different a basis that it makes only for confusion of thought to attempt to argue from the one instance to the other. Certainly, if the judge had received the verdict of involuntary manslaughter in the present case, the State could not have moved to set it aside; and if the accused had filed no motion, this erroneous result would have become the final end of the case. The point I make is, that the court did not err in guiding the jury while the trial was still in progress, so that they brought their part of the trial to a legal conclusion. In what he did and in what he told them he was merely guiding them as a judge should guide them. He told them the truth—not truth of facts (which would have been an invasion of their province), but truth of law. He told them that the verdict they offered was not a legal verdict; and this was true as a matter of law, and not merely as a matter of fact. He told them that they should retire and attempt to make a lawful verdict. It seems to me that to make a lawful verdict is the very object of having a jury—the only legitimate object. I shall never hold that a judge errs because he tells the jury that it is their duty to make a lawful verdict, or that it is their duty not to make one that is not lawful.

More could be said, but enough has probably been said to effect the sole purpose I have in mind, and that is to protest against our looking to the past, instead of to the present and to the future, in determining what is lawful and right on this proposition which divides us. I realize that my colleagues have taken the side of this

question which many judges, perhaps most judges, to-day would take. I realize that their line of reasoning is consonant with the general consensus of the opinions of intelligent men in the past as to the general propositions involved. But this is a question as to which much progress in thought has been made in the past and is still being made. Of course, I refer, not to the particular proposition involved in the present case, but to the broader general proposition as to how the functions of judge and jury can best be co-ordinated in the trial of a case. The trend of progressive thought is toward condemnation of the general verdict, and toward the substitution of special findings of fact by the jury. Some time soon, perhaps in less than a quarter of a century, I expect to see, if I am living, even criminal cases tried according to this plan, which is surest in its results, freest from chances of error, and, if error is committed, affords the greatest opportunity for easy and certain review and correction. I have merely tried to show that right of trial by jury is not impaired by confining the jury, in their deliberations and finding, to specific issues, but that this great and valuable right is increased in efficiency, as an instrumentality of declaring truth and administering justice, by imposing these limitations. And this is what courts are for—to declare truth and to administer justice.

3462. MAXWELL & Co, v. RICE, trustee.

- RUSSELL, J. 1. The court erred in sustaining the general demurrer and dismissing the petition. By the trust deed attached to the petition two trust estates were created, the one a life-estate in trust for the benefit of W. R. Rice, cestui que trust, and the other an estate in remainder for the benefit of the other cestuis que trustent, the children of W. R. Rice. While the estate in remainder is not liable for the debts sought to be recovered in this action, the life-estate held in trust for the benefit of W. R. Rice may, under the allegations of the petition as amended, be liable to be subjected to the payment of the plaintiff's demand.
2. The cause of action asserted by the plaintiff is enforceable in a court of law, and, so far as appears from the petition, the city court of Elberton had jurisdiction of the subject-matter.

Judgment reversed.

DECIDED JANUARY 15, 1912.

Complaint; from city court of Elberton—Judge Grogan. May 11, 1911.

Suit was brought in the city court against C. A. Rice, as trustee for W. R. Rice and the children of W. R. Rice, upon an account for provisions, clothing, plows, guano, etc. The petition was dismissed on demurrer, on the grounds that no cause of action was stated, and that the claim was not enforceable in a court of law. The petition alleges, that C. A. Rice, as trustee for W. R. Rice and the children of W. R. Rice, holds a described tract of land, under a trust deed, a copy of which is annexed to the petition; that by the terms of the deed the trust estate is chargeable with the support and maintenance of all the beneficiaries named therein; that by virtue of the terms of the deed, W. R. Rice, life-tenant, had the right, with the consent of the trustee, to take charge of and use the said land, for his benefit and support and the benefit and support of the other beneficiaries, who were his children; that while he was in possession of the land, with the consent of the trustee, and using it for the support of himself and his family, during the year 1910, the plaintiffs furnished to him, for the benefit of himself and his children, the articles itemized in the annexed bill of particulars; that all the goods so furnished said trust estate were necessities for the support, maintenance, and comfort of the beneficiaries, and were also necessities furnished them for the purpose of making a crop on said land for that year; that afterwards, before maturity of the crops planted by W. R. Rice and his children thereon, and before paying to the plaintiffs any part of their debt for the supplies so furnished, the said trustee, in June, 1910, by virtue of an arrangement between W. R. Rice and himself, took possession of the said premises and the crops growing thereon, and W. R. Rice moved away, leaving his children behind; that the said trustee received the proceeds of the crops grown on the trust-estate land, into the production of which the goods, provisions, and merchandise furnished by the plaintiffs entered, and still holds the same as a part of the trust property belonging to the beneficiaries; that in law and equity, as well as by the provisions of the deed of trust under which the said trustee holds said estate, the plaintiffs are entitled to be paid their debt out of any of the property in the hands of said trustee; that they have made demand upon the said trustee for payment of said debt, since it became due, and he refuses to pay it. They pray judgment against said trustee for the amount of the debt, and that the judgment be declared to be a special charge and

lien upon the trust land described, as well as on the proceeds from it in the hands of the trustee, and on any other property held by said trustee and belonging to the said beneficiaries.

By amendment the petition alleges, that the cestuis que trustent under the trust deed are W. R. Rice, father, and certain children named, of whom four designated are under the age of 21 years; that the trust estate of the said beneficiaries consists of the land described in the said trust deed, which is of the value of \$2,000; that the land is suitable only for agricultural purposes, and yields an annual income of some \$150 to \$200; that the annual income from the trust property is insufficient to maintain and support all the beneficiaries interested therein, and an encroachment upon the corpus thereof is necessary and proper in order to pay the debt of the plaintiffs (\$299.13); and that the amount and character of the goods and articles furnished by the plaintiffs for the benefit and use of the said beneficiaries were necessary and suitable to the condition in life of the said cestuis que trustent, and were such articles and things as supplied the actual wants and necessities of said persons.

The deed referred to in the petition began by stating the purpose of the grantor to dispose of the land described in it for the benefit of his son, W. R. Rice, the said son being (for reasons stated in terms of the Civil Code of 1910, § 3729) unfit to be entrusted with the right and management of the property, and his children being minors. It proceeded as follows: "For the above reason I do now create Charles A. Rice as trustee for the said W. R. Rice, as to the life-estate hereinafter created for the benefit of W. R. Rice, and trustee for the benefit of the children of the said W. R. Rice now living, and such as may hereafter be born to the said W. R. Rice in lawful wedlock, with powers as follows: (a) The said trustee is hereby directed to manage and control fully the life-estate created for W. R. Rice and the remainder estates created for the children of the said W. R. Rice. (b) The said trustee shall be empowered to sell the tract of land hereinafter described and by deed convey the same to the purchaser thereof, which deed shall convey to the purchaser both the life-estate of the said W. R. Rice and the remainder estates of his children. . . (f) The trustee is further empowered to place said land in the hands of said W. R. Rice, if such trustee should think proper to do so, to be used by him during his lifetime, for the use of himself and his family, without

requiring from the said W. R. Rice a statement or return of the proceeds of said land, and the said trustee is hereby relieved [from] any returns or statements to any court, or to any person or persons, of the rents, profits, and proceeds of said land, it being intended that such rents, profits and proceeds shall be used by said W. R. Rice and his family; and is hereby directed that at the death of said W. R. Rice he take charge of, hold, and manage the said land, for the benefit and use of said minor children until the youngest shall become of age, at which time he is directed to divide said land equally between said children, either in kind, or by sale and division of the money. (g) The said trustee is further empowered, in case it should become necessary, to sell and dispose of all the property herein conveyed to him, and to use the corpus or any parts thereof, as may be necessary, for the maintenance and support of the said W. R. Rice and his family during his lifetime, the remainder, if any, to be paid over to the children of said W. R. Rice as above stated. . . (i) Said trustee is appointed and the trust herein created shall be executed for and during the life of W. R. Rice and during the minority of the children of said W. R. Rice, as above stated, and said trustee shall exercise the rights and privileges herein conferred during such period of time. . . Therefore, the premises considered, . . . I hereby grant, bargain, sell, and convey unto the said Charles A. Rice, as trustee for said W. R. Rice, as set forth in the foregoing preamble," the land described, to have and hold the said premises as trustee as aforesaid.

C. P. Harris, for plaintiffs, cited: Civil Code (1910), §§ 3786 et seq., 3771; *Greenfield v. Vason*, 74 Ga. 126; *Maxwell v. Hoppie*, 70 Ga. 152; *Bell v. Watkins*, 104 Ga. 345; *Tate v. Chandler*, 115 Ga. 462-4; *Moore v. Lumpkin*, 63 Ga. 748-51; *Kupferman v. McGee*, 63 Ga. 250-7; *Ragan v. Standard Scale Co.*, 123 Ga. 14; *Roberts v. Tift*, 60 Ga. 571.

Worley & Nall, for defendant, cited: *Clinch v. Ferril*, 48 Ga. 366; *Satterwhite v. Beall*, 28 Ga. 525; *Saunders v. Houston Guano Co.*, 107 Ga. 57; *Mitchell v. Simpson Grocery Co.*, 114 Ga. 200; *Johnston v. Redd*, 59 Ga. 621; *Cruger v. Coleman*, 75 Ga. 695; *Thomas v. Crawford*, 57 Ga. 212.

3369. CASE THRESHING MACHINE CO. v. EZZELL.

HILL, C. J. The allegations of the petition, if proved, in the absence of a defense, would authorize a recovery of the damages claimed, and there was no error in overruling the demurrer.

Judgment affirmed. Pottle, J., not presiding.

DECIDED JANUARY 30, 1912.

Action on contract; from city court of Atlanta—Judge Reid.
March 24, 1911.

Ezzell sued the J. I. Case Threshing Machine Company for \$708.50, on account of an alleged breach of contract. The petition alleges, that on August 1, 1910, the petitioner entered into a contract with the defendant (a copy of which is exhibited), whereby it was to deliver to him a described traction engine, for which he was to pay \$1,250; that before he contracted with the defendant, it "sent one J. D. Perryman to petitioner's home . . . for the purpose of selling petitioner the property described in said contract; that petitioner and the defendant company agreed that petitioner was to purchase 300,000 feet of saw-timber in the woods, and that, for the purpose of conveying the logs from the woods to petitioner's sawmill, the traction engine above described would save petitioner \$2 per thousand on said timber, thus saving petitioner the sum of \$600 on this particular location of timber; . . . that the representative of the defendant company returned to Atlanta and waited until petitioner could negotiate and close the trade for said timber. As soon as petitioner found that he could get the 300,000 feet of timber he notified the defendant company that he would buy the timber, provided he could get the traction engine to haul said timber to his sawmill. The defendant company immediately sent their representative to petitioner's home again, and, as a result of his visit, the contract above referred to was entered into by petitioner in good faith. On the basis of this contract petitioner purchased 300,000 feet of timber, and expended the sum of \$25 for bridges and roads for the purpose of using said engine. After petitioner had built his roads [and] purchased the timber, he received notice from the defendant company to report to McFall, Alabama, as the engine was ready to be loaded. In response to said notice petitioner left his home and carried with him three men, and went to McFall, Alabama, and paid out for railroad fare the sum of \$23, for board \$24, time (three days) for four men, at

\$2 per day, \$24, paid for hauling water to the engine \$5, paid for help to load the engine \$5, man going for head blocks \$2.50, making a total amount paid out and lost by petitioner of \$708.50, on account of defendant's failure to carry out said contract. Petitioner alleges that the defendant company, although they had accepted the contract, notified him to go and load the engine on the train, wired him after he got to McFall to remain there, and kept him there for three days, wantonly and without cause refused to allow petitioner to load said engine, wilfully and wantonly disregarded their solemn contract entered into, and refused to deliver to petitioner the property described in the contract. . . . Petitioner alleges that he complied with all the conditions of said contract." The contract referred to as attached to the petition is in the form of an order, addressed to the J. I. Case Threshing Machine Company and signed by the plaintiff, directing shipment of a described traction engine, for which the plaintiff agrees to pay \$1,250. The order contains the following stipulations: "As a condition thereof it is fully understood and agreed that said machinery is purchased as second hand, and not warranted. No representation made by any person as an inducement to give and execute this order shall bind the company. The company assumes no liability for non-delivery, non-shipment, delay in shipment or transportation." The name of J. D. Perryman appears in the order as "salesman."

The defendant demurred generally, and on the following grounds: That it did not appear what authority Perryman had to represent the defendant, or that he was such an agent as that assurances or statements made by him would bind the defendant; that it did not appear whether the representations made by Perryman were in parol or in writing, and, if in writing, no copy of the writing was exhibited; that the petition failed to set out a copy of the plaintiff's letter to the defendant; that it appeared from the contract exhibited that no representation made by any person as an inducement to execute the contract bound the defendant; that the alleged damages were speculative and conjectural, and were too vague and indefinite to constitute the basis of recovery; and that, special damages not being recoverable, and there being no prayer for general damages, the plaintiff should not recover.

Payne, Little & Jones, for plaintiff in error, cited: *Cable Co. v. Powell*, 2 Ga. App. 73; *Langston v. Postal Telegraph-Cable Co.*, 6

Ga. App. 833; 1 Am. & Eng. Enc. L. (2d ed.) 987; *Baldwin v. Daniel*, 69 *Ga.* 782 (5); *Biggers v. Equitable Mfg. Co.*, 124 *Ga.* 1045; *Stimpson Computing Scale Co. v. Taylor*, 4 *Ga. App.* 567; *Hand v. Armstrong*, 34 *Ga.* 233, 235; *Christophulos Café Co. v. Phillips*, 4 *Ga. App.* 819.

3445. PETERSON v. STALVEY.

RUSSELL, J. The petition of the plaintiff in the court below alleged that one Joe Teaser was the tenant of the defendant. If this statement had been proved by any evidence, the verdict would have been supported as to this point, because the duty devolved upon the landlord to keep his premises in such condition as would protect the safety of his tenants and of live stock being used by them. However, the evidence, both for plaintiff and defendant, established, without contradiction, that Joe Teaser was not a tenant of the defendant, but a trespasser, attempting to occupy the premises of the landlord without his permission or knowledge; and, under the facts appearing in the record, no duty with reference to the safety of Joe Teaser or of the horses he was driving devolved upon the landlord, other than that of not wilfully and wantonly injuring them. Moreover, the fright of the horses appears to have been the proximate cause of the injury, and this is not traceable to the presence of the open well. For these reasons the verdict was unsupported by the evidence, and a new trial should have been granted. The facts of the present case distinguish it from *Bailey v. Dunaway*, 8 *Ga. App.* 713.

Judgment reversed. Pottle, J., not presiding.

DECIDED JANUARY 30, 1912.

Action for damages; from city court of Douglas—Judge McDonald. April 8, 1911.

Stalvey sued Peterson for damages on account of injuries to a pair of horses and a buggy, caused by their falling into an unprotected well on land owned by the defendant, on becoming frightened and breaking loose while being driven to a house on the land by Joe Teaser, to whom the plaintiff had hired them, and who, it was alleged, was a tenant of the premises. The defendant, in his answer, denied that Joe Teaser was his tenant, and denied that the condition of the well was the proximate cause of the injury. The trial resulted in a verdict against the defendant, and he moved for a new trial, alleging that the verdict was without evidence to support it. The motion was overruled and he excepted.

F. Willis Dart, for plaintiff in error, cited: *Garner v. Town of East Point*, 7 *Ga. App.* 630, and cases cited therein.

O'Steen & Wallace, contra, cited: *City of Atlanta v. Wilson*, 59 Ga. 544; *City Council of Augusta v. Hudson*, 94 Ga. 135.

3659. MUSGROVE v. LUTHER PUBLISHING COMPANY,
for use, etc.

1. When it becomes necessary for the purpose of enforcing his rights, a party plaintiff may amend by substituting the name of another person in his stead, suing for his use.
2. The evidence demanded the verdict rendered, and there was no error in overruling the motion for a new trial.

DECIDED FEBRUARY 12, 1912.

Complaint; from city court of Miller county—Judge M. C. Edwards presiding. April 29, 1911.

W. I. Geer, for plaintiff in error.

Bush & Stapleton, contra.

POTTLE, J. During the March term of the city court of Miller county, a suit upon an open account, sounding, "The Phillips-Boyd Publishing Company v. L. L. Musgrove," was called for trial. Over objection of the defendant the plaintiff was allowed to amend its petition, by striking the name of the Phillips-Boyd Publishing Company as plaintiff and substituting in lieu thereof the name of D. E. Luther Publishing Company, suing for the use of the Phillips-Boyd Publishing Company. Exceptions pendente lite were duly filed to the order of the court allowing this amendment, and error has been assigned in this court upon these exceptions. It appears that the Luther Publishing Company had been adjudicated a bankrupt, and that its assets, including the account sued on, had been sold to the Phillips-Boyd Publishing Company.

1. Under the provisions of the Civil Code (1910), § 5689, the plaintiff had the right to amend its petition by substituting the name of the D. E. Luther Publishing Company, suing for the plaintiff's use. It was argued in the brief of counsel for both sides, and the record transmitted to this court shows, that the case was originally filed in the name of the D. E. Luther Publishing Company, as plaintiff; that at a previous term of the court, over objection of defendant's counsel, the plaintiff was allowed to amend by striking the name of this plaintiff and substituting that of the Phillips-Boyd Publishing Company, in its stead; and that exceptions pendente

lite were duly filed by the defendant to this ruling. Counsel for the plaintiff in error insists in his brief that, this original ruling being wrong, the court had no power at a subsequent term to correct the error by restoring the name of the original plaintiff as a party, suing for the use of the Phillips-Boyd Publishing Company. This position of counsel for the plaintiff in error is very probably correct, but there is no assignment of error in the present bill of exceptions which authorizes this court to pass upon such a question. As to this point the only complaint made in the bill of exceptions is that the court permitted the Phillips-Boyd Publishing Company to substitute the name of the D. E. Luther Publishing Company as plaintiff, suing for its use. We are compelled to deal with the case as if it had been originally brought in the name of the Phillips-Boyd Publishing Company. There is no merit in this assignment of error, and we can not look to the record for the purpose of ascertaining that an antecedent error was committed by the court, of which no complaint is made in the bill of exceptions.

2. The evidence demanded the verdict rendered, and there was no error in overruling the motion for a new trial.

Judgment affirmed.

3368. WEST v. MORRIS.

The court did not err in overruling the general demurrer.

DECIDED JANUARY 15, 1912. REHEARING DENIED MARCH 2, 1912.

Complaint; from city court of Atlanta—Judge Reid. April 1, 1911.

Smith, Hastings & Ransom, for plaintiff in error.

A. E. Ramsaur, A. E. Wilson, contra.

RUSSELL, J. According to the allegations of the petition, the defendant requested the plaintiff, as his agent, to employ an attorney to make an abstract of title for him. This, of course, would imply a promise on the part of the defendant to pay a reasonable fee to the attorney whom the plaintiff, as the defendant's agent, employed; and, consequently, there was enough in the petition to withstand a general demurrer, and the court did not err in overruling the demurrer in the form in which it was presented.

It appears, however, from the contract which was entered into,

that the petition would have to be amended by inserting a new plaintiff, suing for the use of the present plaintiff, before he could recover the commissions, also claimed, even if he establishes the other allegations of the petition. The contract upon which the suit is based is as follows:

“Atlanta, Ga., Feby. 17, 1910.

“I hereby agree to purchase from owner, through R. S. Morris, agent, one house and lot, known as 305 Formwalt St., for which I agree to pay \$3,400.00 on the following terms: \$2,500.00 cash, assume loan for \$———, due ——— at ———, and balance \$25.00 per month with 7 % interest made on or before. I have this day, at 9 o'clock a. m., deposited with R. S. Morris, agent, \$25.00 to bind this trade. A reasonable length of time to be allowed for examination of titles by my attorney, and if titles are good, I agree to make settlement at once; but if titles are not good, and can not be made good in a reasonable length of time, this deposit is to be returned to me and trade canceled. Upon my failure to comply with contract, I agree to pay R. S. Morris, agent, the amount of his commission on said sale.

“[Signed] W. H. West, purchaser.

“————— hereby accept the above offer upon the terms and conditions herein named, and guarantee the titles to be good, and agree to pay R. S. Morris, agent, a commission on the gross amount as follows, viz.: 5 per cent. on the first \$2,000, and 2½ per cent. on the excess over the first \$2,000. In the event the buyer fails to pay for the property as stipulated above, then the amount paid in is forfeited, and is to be kept by R. S. Morris, agent, as compensation for services rendered by him in the trade.

“[Signed] D. M. Deitch, owner.”

Morris can not recover upon this contract, though Deitch, the owner, suing for his use, might do so.

Judgment affirmed.

NOTE:

The case of *Taylor et al.*, trustees, v. *Matthews et al.*, decided at the October Term, 1911 (February 24, 1912), is reported on page 852, *infra*.

CASES
DECIDED IN THE
COURT OF APPEALS OF GEORGIA
AT THE
MARCH TERM, 1912.

3571. **McDOUGALD v. CHATTANOOGA MEDICINE CO.**

1. When an appeal is entered from a judgment of a justice's court to a jury in the superior court, the former court loses all jurisdiction of the case; and if, by mistake, an appeal from the same judgment to a jury in the justice's court is subsequently entered, and a verdict is returned on the latter appeal and a judgment entered thereon, the latter proceedings are mere nullities.
2. If the defendant in a suit in a State court desires a stay of the proceedings therein, because of his having been adjudicated a bankrupt, until the application for his discharge can be heard and decided by the bankruptcy court, or if he desires to set up his discharge as a defense to such suit, he must plead the adjudication or the discharge. After judgment has been rendered in the State court he can not attack the validity of the judgment therein and move the court to set aside the judgment or to treat it as a "nullity," either because of the pendency of the bankruptcy proceedings or because of his discharge in bankruptcy from the debt on which the judgment is based. Bankruptcy proceedings must be pleaded and proved, if relied upon. Courts other than a bankruptcy court will not take judicial cognizance of such proceedings.

DECIDED MARCH 6, 1912.

Motion to set aside judgment; from Fulton superior court—
Judge Bell. March 25, 1911.

S. C. Crane, for plaintiff in error. *Walter C. Hendrix*, contra.

HILL, C. J. The procedure in this case is somewhat anomalous. The plaintiff in error calls it a motion to treat the judgment of the superior court as a "nullity." In some doubt as to the charac-

ter of his pleadings, he asks that this motion be treated by this court as a motion for a new trial. We think it is more properly a motion to set aside a judgment rendered by the superior court on the facts stated in the motion. From a confused record we have, after some study, evolved the following to be the case: From a judgment in favor of the plaintiff in a suit on an account in a justice's court the defendant entered an appeal to a jury in the superior court. After the appeal papers had been transmitted to the clerk of the superior court the defendant—presumably by inadvertence—entered an appeal from the same judgment to a jury in the justice's court; and a verdict was rendered on the latter appeal and a judgment entered thereon. Subsequently the attention of the justice was called to the fact that an appeal had previously been entered to a jury in the superior court in the same case, and he treated as nugatory the appeal to the jury in the justice's court.

After verdict and judgment in favor of the plaintiff, on the appeal in the superior court, the defendant, at the same term of the court, filed a motion to treat this judgment as a nullity, upon the following grounds: (1) Because the defendant, after judgment was rendered in the justice's court, filed his petition in bankruptcy in the district court of the United States for the northern district of Georgia, and listed in his bankruptcy schedule his debt to the plaintiff, and the judgment rendered thereon in the justice's court, as one of his provable debts. (2) That on the said petition in bankruptcy the defendant was adjudged a bankrupt, "and has made his application for a final discharge, and a final discharge would be a release from [the plaintiff's] claims," and, therefore, the judgment in the superior court against him should be "vacated and treated as a nullity," and the execution issued on the judgment be stayed until the final disposition of the defendant's application for discharge by the district court. To this motion the movant offered an amendment setting up the following additional grounds: (1) That the plaintiff was bound by the verdict and judgment in the justice's court, and had no right in law to proceed further in the case in the superior court until the verdict and judgment had been reversed and set aside or declared a nullity by order of the justice or of the superior court; that the verdict and judgment in the justice's court ended the case so far as the plaintiff was concerned, and there was no suit pending against the defendant and the se-

curity upon the appeal bond at the time that the papers were sent to the superior court. (2) That the act of the plaintiff in proceeding further in the case in the superior court, after the papers had been sent up by the justice of the peace, was a fraud on the court as well as on the movant, because it was the duty of the plaintiff, when the case was called for trial in the superior court, to inform the court that the defendant had filed his petition in the bankruptcy court and had listed the plaintiff's claims as one of his provable debts, and also to inform the court that the verdict and judgment had been taken in the justice's court, so that the superior court would have been informed as to the true status of the case between the parties and the court; that for these reasons the judgment should be set aside as a nullity, and a new trial be granted to the defendant, and he be allowed to file his plea of bankruptcy. This amendment was disallowed, and to this ruling the defendant excepted. The judge of the superior court denied the motion to treat the judgment as a nullity, and to this also the defendant excepted.

After reviewing the case we find no merit in the motion, even if the amendment had been allowed, although we frankly confess that we are not entirely clear as to what are the contentions of the plaintiff in error. He apparently objects to the conduct of the justice of the peace in treating the appeal entered to a jury in his court and the verdict rendered by the jury thereon as nugatory, in view of the fact that an appeal had previously been entered to a jury in the superior court from the judgment of the justice's court. He proceeds on the idea that the justice of the peace, after having rendered a judgment in the case, could not set it aside. This is true, but where a justice's court, as in the present case, renders a judgment on a verdict of a jury in that court after an appeal has been entered to a jury in the superior court, the judgment in the justice's court is entirely void, and the justice himself, as well as any other court, can legally disregard it and treat it as a nullity whenever and wherever it may be brought in question (*Fontaine v. Bergen*, 55 Ga. 410); and the court may proceed in such case as though such verdict and judgment had not been rendered. *Chapman v. Boyd*, 68 Ga. 455. Manifestly, after an appeal had been entered in the justice's court from the judgment therein to a jury in the superior court, the justice's court lost jurisdiction entirely of the case, and there was no case pending therein on which any

further proceedings could be taken; and, consequently, the verdict rendered on the appeal from the judgment of the justice to a jury in that court, and the judgment of the justice thereon, were mere nullities.

The real point insisted upon by the plaintiff in error is that the judgment in the superior court should be treated as a nullity because, after the suit had been filed in the justice's court and an appeal entered to the superior court, he filed his petition in bankruptcy, listing the plaintiff's claim in the schedule as one of his provable debts. No plea setting up the bankruptcy proceedings was filed in the justice's court or in the superior court. It is stated, in the motion made to treat the judgment as a nullity, that counsel for the defendant had called the attention of the justice of the peace to the fact that these bankruptcy proceedings had been filed and were pending. A motion to set aside a judgment on account of bankruptcy, where bankruptcy is not pleaded, will not be sustained. *Pulliam v. Dillard*, 71 Ga. 599. If a defendant desires a stay of the proceedings until his application for discharge can be passed upon by the bankruptcy court, or if he desires to set out his discharge as a defense, he must do so by a plea in the suit and before a judgment is rendered against him. He can not, after judgment is rendered against him, attack such judgment on either ground by affidavit of illegality or otherwise. *Finney v. Mayer*, 61 Ga. 500; *Farmers & Traders Bank v. University Pub. Co.*, 9 Ga. App. 128 (5), (70 S. E. 602). Certainly the trial judge could not take judicial cognizance of the pendency of bankruptcy proceedings against the defendant. *Woodward v. McDonald*, 116 Ga. 750 (42 S. E. 1030). There was no error in the judgment of the superior court, overruling the motion to treat as a nullity its judgment rendered in the case.

Judgment affirmed. Pottle, J., not presiding.

3643. CALHOUN v. CENTRAL OF GEORGIA RAILWAY COMPANY.

As even the plaintiff's evidence demanded a verdict for the defendant, the errors assigned upon the charge of the judge are immaterial. There was no testimony in behalf of the plaintiff other than such as required a finding that the casualty was a pure accident; but even if the usual

presumption of negligence applicable to injuries resultant from the operation of the trains of a railroad company could be said to have arisen, the presumption was fully rebutted.

DECIDED MARCH 6, 1912.

Action for damages; from city court of Savannah—Judge Davis Freeman. July 29, 1911.

Osborne & Lawrence, R. R. Arnold, for plaintiff.

H. W. Johnson, for defendant.

RUSSELL, J. There are various assignments of error predicated upon the charge of the court. The court erred in charging that the plaintiff, who was an employee of the defendant company, must show himself free from fault. It was unnecessary for the plaintiff to do this. The action, as was pointed out when this case was here before (7 Ga. App. 528, 67 S. E. 274), was distinctly brought under the Federal "employer's liability act." Some of the other excerpts from the charge, to which exceptions are taken, may not be aptly adjusted to the cause. But all of these exceptions become immaterial, for, upon review of the plaintiff's own testimony, it is quite apparent that the verdict in behalf of the defendant was demanded. No other verdict could have been legally reached. Even if the jury believed the unreasonable story of the plaintiff, there was nothing that could have been done by the engineer that was not done, and the plaintiff himself did nothing. He did not even call the attention of the engineer to the cow which he said was approaching from his side of the track, and which, according to his account, he thought would probably be run over. He did not ring the bell to frighten the cow, and he deliberately got down from his seat in the presence of danger and went to shoveling coal. There was no negligence proved by the plaintiff except his own. There was nothing in the testimony of the defendant's witnesses to evidence anything but a pure accident.

Judgment affirmed. Pottle, J., not presiding.

3698. ROGERS v. DURRENCE.

In a suit against an agent, to recover money voluntarily paid to him by mistake in fact, the controlling question, in determining his individual liability to repay the money, is whether he still has the money in his possession at the time of the suit, or whether he had, before the suit

was brought and before he had any notice of the mistake, paid over to his principal the money received by mistake. If he still has the money in his possession at the time of the suit, or had it in his possession when he received notice of the mistake, he would be personally responsible, although payment to his principal may have been subsequently made by him. In the present case this controlling question was issuable, under the evidence, and the direction of a verdict for the plaintiff was erroneous.

DECIDED MARCH 6, 1912.

Complaint; from city court of Statesboro—Judge Strange. August 4, 1911.

Homer C. Parker, for plaintiff in error.

Remer Proctor, Johnston & Cone, contra.

HILL, C. J. R. L. Durrence brought suit against S. A. Rogers, alleging that the defendant was indebted to him on an account, in the sum of \$250, with interest at the rate of 7 per cent. per annum from February 6, 1911. At the conclusion of the evidence the trial judge directed a verdict for the plaintiff, for the full amount; and the defendant assigns error. The facts in the case, substantially stated, are as follows: The defendant, S. A. Rogers, was a contractor, and had agreed to build a house for Dr. J. T. Rogers, for \$1,000. Dr. Rogers made arrangements with the Statesboro Building & Loan Association to borrow \$1,000 on the property, and instructed the plaintiff, R. L. Durrence, who was secretary and treasurer of the building and loan association, to pay this money over to S. A. Rogers for the purpose of being used in the construction of the house. This was early in the year 1910. S. A. Rogers was to call on Durrence, secretary and treasurer of the loan company, from time to time as the money was needed, and get from him checks drawn on this fund, to be used for the principal, Dr. Rogers. These checks were all made payable to S. A. Rogers, and in the corner of each check there was this memorandum for identification: "For J. T. Rogers." While the house was being erected Dr. Rogers asked S. A. Rogers to let him have \$250 of the money borrowed from the association on this account, promising at the time to replace it, and, in pursuance of this request, S. A. Rogers gave Dr. Rogers \$250 of the money. The evidence does not clearly show what Dr. Rogers meant when he said he would replace the money,—whether he would return it to S. A. Rogers, or to the bank, subject to the check of S. A. Rogers. After the completion of the house Durrence discovered that he had overpaid S. A. Rogers to the

extent of \$250, the amount for which he sues. He claims that he made this overpayment through a mistake, and that, after he discovered the mistake, he called upon the defendant to reimburse him this amount, as he had settled with the loan company for his mistake, and that he was entitled to recover this amount as an individual from the defendant. The defendant admitted that he had received, on account of the loan made by the loan company, \$250 in excess of the amount which had been borrowed from the company by Dr. Rogers, but claimed that before he discovered the mistake and before any demand had been made on him for this excess, he had disbursed all the money received by him for the benefit and at the direction of his principal, and that he had none of the funds remaining in his hands; that in making the disbursements he was acting simply as the agent of Dr. Rogers, and, having paid over to him or used for his benefit all the money, including this excess, he was not individually liable for the same.

The evidence is not clear as to whether the defendant, as the agent of Dr. Rogers, had in fact paid the money over to his principal, or had used it for the benefit of his principal, before the mistake was discovered and his attention called to the fact. There are some circumstances from which the jury might have inferred that the defendant knew that he had been paid the \$250 in excess of the amount borrowed by Dr. Rogers from the loan company, before he paid the amount to his principal or used it for his benefit. The Civil Code (1910), § 3608, provides as follows: "If money be paid to an agent by mistake, and he in good faith pays it over to his principal, he shall not thereafter be personally liable therefor. In all other cases he is liable for its repayment. If money be paid by an agent by mistake, he may recover it back in his own name." In the case of *Law v. Nunn*, 3 Ga. 90, it is held: "In actions against agents, for money voluntarily paid by mistake in fact, the true distinction is, where the agent has paid the money over to his principal in good faith he is not personally liable; but when he has not paid the money over, or before such payment he has notice of the mistake, and is required not to pay it, then he is personally responsible, although payment to his principal may have been made." The overpayment made by mistake to the defendant is not disputed. The fact that the money was paid to him to be used for the benefit of his principal in the construction of the house

is not in dispute. While the defendant testified positively that he had paid the money over to his principal, or used it for the benefit of his principal, in good faith, before he had notice of the mistake, there are circumstances apparently in conflict with his testimony on this point, and, under the code section cited, *supra*, and the decision in *Law v. Nunn*, *supra*, the individual liability of the defendant, as the agent of Dr. Rogers, to refund the \$250 paid to him by mistake by the plaintiff depends upon whether as agent he paid the money over to his principal, or used it for his benefit, before he knew of the mistake. We think this question was clearly issuable, and should have been submitted to the jury; and for this reason the trial judge erred in directing a verdict for the plaintiff.

Judgment reversed.

3707. LOYLESS *v.* HESSE ENVELOPE & LITHOGRAPH-
ING CO.

1. Misrepresentations made by an agent in procuring a contract, when they amount to a fraud, may be alleged and proved as a defense to a suit upon the contract. Testimony that such misrepresentations were made, and that relying upon their truth the defendant was induced to make the contract, does not alter the terms of the contract, but furnishes a reason why it is void and can not be legally enforced.
2. The motion to dismiss the writ of error is without merit.

DECIDED MARCH 6, 1912.

Complaint; from city court of Atlanta—Judge Calhoun. June 24, 1911.

A. E. Ramsaur, A. E. Wilson, for plaintiff in error
George B. Rush, contra.

HILL, C. J. The Hesse Envelope & Lithographing Company sued D. A. Loyless in the city court of Atlanta, alleging in substance as follows: On or about December 12, 1908, Loyless ordered of petitioner 50,000 envelopes, at an agreed price of \$2.65 per thousand, to be shipped to the Byrd Printing Company, Atlanta, Georgia, f. o. b. St. Louis, Missouri. The envelopes thus ordered had to be made up and stamped with certain printed matter especially for the defendant, and, being thus printed and stamped, they were useless to petitioner or to any one else, except the defendant. On or about January 6, 1909, as per instructions

received from the defendant, plaintiff shipped to the Byrd Printing Company, for the defendant, 10,000 of the special size envelopes so ordered. Petitioner has fully complied with its contract, has manufactured and printed 50,000 envelopes in compliance with the order, and has delivered 10,000 of them, and holds the other 40,000 subject to the defendant's order. Defendant refuses to accept the balance of the order and refuses to pay for the 10,000 delivered, as well as for the 40,000 held subject to his order; and the suit is filed to recover the agreed price to be paid for the entire 50,000 envelopes, with interest thereon.

The defendant by a plea admits that he ordered the quantity of envelopes alleged, and alleges that he refused to pay for them for the following reasons: That he was induced to order the envelopes by an agent or salesman of the plaintiff, one A. A. Allen, to whom he stated that he desired them for the purpose of sending out a trade paper or magazine known as "The Southern Carbonator and Bottler," which is a bulky publication averaging from 95 to 120 pages to the issue, and printed on thick, heavy paper; that never having used envelopes in the mailing of his magazine, and being wholly ignorant of the paper business, he did not know what particular grade or style of envelopes to order, and so stated to the said Allen at the time, but informed him that he wanted an envelope made of paper sufficiently strong and tough to permit of carrying his magazine through the mails without tearing, and that no other sort of envelope would answer his purposes; that Allen then exhibited to defendant a sample envelope and represented to defendant that envelopes made according to this sample would be in every way sufficient for his needs, and expressly warranted that the envelopes would be made according to this sample and would safely carry the defendant's magazine through the mail, a copy of which magazine was exhibited to Allen for the purpose of showing him its weight and size; that relying upon this warranty and upon the express consideration that the envelopes to be furnished would be sufficiently strong and tough to carry his magazines through the mails, defendant thereupon ordered the 50,000 envelopes; that early in the month of January, 1909, defendant received from the plaintiff an advance shipment of 10,000 envelopes upon the order, and upon the occasion of the issuance of the next number of his magazine he used some 2,500 of the envelopes in sending out

his magazines to his subscribers; that instead of the envelopes being of the grade and quality ordered by him, they were made of flimsy, inferior paper, which was easily torn, and would not sustain the weight of the magazine, and defendant was compelled, as a measure of precaution, to wrap each copy of his magazine with twine outside of the envelope, in the hope of preventing the envelope from bursting and the magazine from being lost in the mails; that even with this precaution a large number of the magazines were returned to him by the postal authorities on account of being insufficiently wrapped, because of the inferiority of the envelopes, and because the envelopes had become torn and mutilated from the ordinary handling in the mails, to the extent that the addresses were torn therefrom; and that all of the magazines which were not returned to him by the postal authorities reached their destination with the envelopes in a torn and mutilated condition by reason of the flimsiness and inferiority of the envelopes; that on account of the very inferior quality of the envelopes shipped to him, they were utterly useless to him and could not be used for any purpose whatever, and he was compelled immediately to order wrappers for the purpose of getting out the remaining copies of his magazine; that he at once notified plaintiff of the inferior quality of the envelopes which had been shipped to him and countermanded the order for the remaining 40,000; but inasmuch as he had endeavored to use some 2,500 of the envelopes, he offered to pay plaintiff for the 10,000 which he had accepted, though realizing that he was not bound to make such an offer; that the plaintiff declined to accept the payment offered in full settlement of the account against him, and demanded payment for the entire 50,000 envelopes. In brief, the defense set up was fraud in the procurement of the order, breach of express warranty, and failure of consideration. The jury returned a verdict in favor of the plaintiff, for the full amount; and the defendant excepts to the refusal of a new trial.

1. On the trial certain testimony offered by the defendant, to prove the allegations of his plea as to the misrepresentations which induced him to give the order for the envelopes, was excluded by the court, on the ground that, the order being in writing, this evidence was inadmissible because it varied the terms of a written contract. The defendant offered to prove the representations made to him at the time that the order was given by the

salesman of the plaintiff, and the exhibition by the salesman to him of a sample copy which he claimed to be suitable for the defendant's purpose, promising that the 50,000 envelopes to be furnished to the defendant by the plaintiff should be like the sample. The trial court erred in excluding this testimony. It is not within the rule that parol testimony is inadmissible to alter or vary the terms of a written contract. "A plea of breach of warranty and failure of consideration does not add to or vary a written contract between the parties, although the plea does not allege fraud, deceit, or mistake in the making of the contract." *Aultman v. Mason*, 83 Ga. 212 (9 S. E. 536). The plea in the present case, however, does allege fraud in the procurement of the order for the envelopes by the untrue representations made to the defendant by the salesman of the plaintiff, which induced him to give the order. Misrepresentations of an agent in procuring a contract may amount to fraud upon the purchaser, and a plea setting up these facts would be a good defense to an action brought upon the contract, and evidence in support of such a plea would be admissible, notwithstanding that the contract stipulated that no other representations, except those contained therein, would be binding on the seller. While the written contract could not have been altered by parol, yet if its execution was the result of fraud, accident, or mistake, such fact could have been pleaded and proved by parol in avoidance thereof. *Ham v. Parkerson*, 68 Ga. 830; *State Historical Association v. Silverman*, 6 Ga. App. 560 (65 S. E. 293). "Where a party has been induced to enter into a contract by a wilful fraud on the part of the other party, calculated to deceive and which does deceive, the defrauded party may set up the fraud in his defense to an action on the contract." *Turner v. Ware*, 2 Ga. App. 57 (58 S. E. 310). And Mr. Justice Lumpkin, in the case of *Epps v. Waring*, 93 Ga. 765 (20 S. E. 645), declares that "it is a universally recognized doctrine, supported by all respectable text-writers and upheld in every well-considered case bearing upon this subject, that where a party has been induced to enter into a contract by a wilful fraud on the part of the other party, calculated to deceive, and which does deceive, the defrauded party may set up the fraud, in his defense to an action upon the contract." Under these authorities we think it very clear that the trial judge erred in not allowing the defendant to prove, by testimony which was offered, the allegations

of his plea, and especially the representations made by the salesman of the plaintiff, which induced the defendant to give the order for the envelopes, and which were alleged to have been untrue. The attempt was not to vary the terms of the written order, but to get rid of it because of fraud in its procurement.

2. When this case was called for argument in this court, a motion was made to dismiss the writ of error, because the brief of evidence filed with the motion for a new trial was not that which was agreed upon by counsel, in that it did not have attached to it a copy of the written order for the envelopes and certain letters claimed to have been written by the defendant to the plaintiff confirmatory of this order. The motion is without merit. There was no dispute as to the contents of the order or of the letters alluded to. They were referred to by both plaintiff and defendant in the oral evidence, and they are set out in the brief of counsel for the defendant in error, and their correctness is admitted by the brief filed by the plaintiff in error. The decision of this court in granting a new trial does not depend upon a consideration of the written contract or of the letters of the defendant confirmatory of that contract, but the reversal is ordered because of the error in excluding testimony offered by the defendant to prove the allegations of his plea relating to the false and fraudulent representations of the plaintiff's salesman which induced him to give the order for the envelopes.

Judgment reversed.

3722. CATE *v.* KNIGHT *et al.*

1. Where an affidavit founded upon the Civil Code (1910), § 5395 et seq., charges the defendant with both forcible entry and forcible detainer, in order to authorize a general verdict against the defendant it must appear that he entered upon the premises in defiance of the occupant, and with such a display of force as to deter him from maintaining his possession, and that, after so entering, the defendant detained possession of the premises with a display of like force.
2. Applying this rule to the facts of the present case, the court erred in refusing to sustain the certiorari.

DECIDED MARCH 6, 1912.

Certiorari; from Walker superior court—Judge Maddox. September 5, 1911.

Foust & Payne, R. M. W. Glenn, W. M. Henry, for plaintiff in error.

W. P. McClatchey, contra.

POTTLE, J. Knight and others instituted an action against Cates, under the provisions of the Civil Code (1910), § 5395 et seq., charging that the defendant did "with menaces and force and arms, violently and without authority of law," take possession of a described lot of land, and does now "forcibly detain same without authority of law." The jury found for the plaintiffs, and the defendant excepts to a judgment overruling his certiorari. The only point made in this court is that the verdict is contrary to law and the evidence.

It has been held that where a defendant is indicted for forcible entry and detainer as one offense, he can not be convicted unless the evidence shows both a forcible entry and a forcible detainer. *Blackwell v. State*, 74 Ga. 816. Analogizing this to the civil proceeding, it would seem that where the affidavit alleges both a forcible entry and a forcible detainer, it would be necessary to prove both a forcible entry and a forcible detainer. See, in this connection, *Griffin v. Griffin*, 116 Ga. 754 (42 S. E. 1005). The only issues involved in a proceeding of this character are the possession and the force. Civil Code (1910), § 5398.

There is some question, under the evidence, as to whether the plaintiffs were in possession of the premises in dispute; but, without reference to this question, we are clear that the verdict was unauthorized, because no such force was shown as is contemplated by the statute. "To enter upon premises in defiance of the occupant and with such a display of force as reasonably to deter him from maintaining his possession is forcible entry." *Lissner v. State*, 84 Ga. 669 (11 S. E. 500, 20 Am. St. Rep. 389). See, also, *Lewis v. State*, 99 Ga. 692 (26 S. E. 496, 59 Am. St. Rep. 255); *Griffin v. Griffin*, 116 Ga. 754 (42 S. E. 1005); *Hamrick v. Darnell*, 43 Ga. 433; *Lott v. Peterson*, 95 Ga. 516 (20 S. E. 275). It seems, from the evidence, that the defendant owned lot No. 200, and the plaintiffs owned lot No. 233. There was a dispute in reference to the location of the line between these two lots. The defendant built a house and occupied it. He claims that the house is on his lot, and the plaintiffs claim that he built the house over the line, on their land. There is absolutely no evidence of any

character to show any forcible entry by the defendant. One of the plaintiffs testified that he told the defendant not to build or to move on the place. But the mere fact that the defendant disregarded this notice and peaceably and quietly moved into the house which he had built is no evidence of force such as is contemplated by the statute. Nor do we think there was any evidence authorizing a finding that the defendant had forcibly detained the premises in dispute.

After the defendant had moved into the house, one of the plaintiffs went to him and told him to move off, and he refused to do so, "but told him that before they got rid of him they would have a happy time of it." He made no display of force, offered no violence, and made no other threat. It is claimed that this was such a show of force, such an indication that the defendant would use force if necessary to maintain his possession, as to bring the case within the rule laid down in *Lissner v. State*, supra; but we do not agree with this conclusion. The defendant's language may have been a mere idle threat. He may simply have meant that he intended to resist the plaintiffs with legal proceedings, which he had a right to do. At any rate, there was absolutely no manifestation of any force. The proceeding is not intended to try title to land; nor to take the place of an action of ejectment, nor to settle disputed land lines. There being no evidence of either forcible entry or forcible detainer, the trial judge should have granted the certiorari.

Judgment reversed.

3725. HODNETT v. MANN.

1. Where an owner of land contracts with another to sell it at a stipulated price, to be divided into instalments becoming due at specified times, and further stipulates that in the event the instalments are not paid when they mature, the owner shall be paid a specified sum as rental for the land, the legal effect of the contract is to create the relation of landlord and tenant between the parties, with an option to the tenant to purchase the land upon the terms and conditions set forth in the contract.
2. Where, after the execution of such a contract, and before the first instalment of the purchase-price becomes due, the parties mutually agree upon a rescission of so much of the contract as relates to a purchase of the land, the owner has a lien upon the crops grown upon the premises

described in the contract, both for rent and for supplies furnished by him which were necessary to make the crop.

DECIDED MARCH 6, 1912.

Money-rule—appeal; from Coweta superior court—Judge R. W. Freeman. September term, 1911.

T. F. Rawls, for plaintiff in error.

W. L. Stallings, contra.

POTTLE, J. This was a money-rule. The contest was between the holder of a common-law fi. fa., issued in 1909, and the holder of a distress warrant, sued out in 1910 and claiming rent for that year. The judge awarded the fund to the holder of the distress warrant, and the judgment creditor excepts. The facts were these: In January, 1910, Mann entered into a written contract with Georgia Peeples and Walt Peeples, under the terms of which he agreed to sell to the other parties a described tract of land for \$800, to be paid in instalments. The first instalment was to fall due October 15, 1910, and the last instalment October 15, 1913. The contract further provided: "And it is further agreed that in the case the said Georgia and Walt Peeples fail to pay one or either of those notes as they come due, we agree to pay fifteen hundred pounds of middling lint cotton rent for that year, for the use of said farm. And upon payment of all of the above notes I. B. Mann agrees to make or cause to be made a good and sufficient title to said land." The contract was signed by all three of the parties. During the year 1910 Mann advanced to the two Peeples money and supplies necessary to make a crop. Early in the fall of 1910, and some time before October 15, the parties to this contract agreed on a rescission of so much of it as related to the agreement to purchase the land, leaving the contract standing as one of rental only. Mann received 1600 pounds of lint cotton which was grown on the premises in question, and, after paying for supplies which he had advanced to the persons who made the crop, he credited 880 pounds of cotton on the rent. The common-law fi. fa. was levied on the remainder of the crop, and Mann claims the proceeds arising from the sale, under his distress warrant, which he duly foreclosed and placed in a constable's hands.

1. In *Perry v. Paschal*, 103 Ga. 134 (29 S. E. 703), Perry delivered to Sims a paper of which the following is a copy: "This is to certify that I have this day bargained to Jim Sims fifty acres

of land, off of the southeast corner of lot No. 20 in the 4th district of Terrell county, Ga. The road running from the Hayes place to Dorse Henry's being the line. I agree to make him a good title on his paying me \$500. I agree to run said amount three years, provided he pays the rent promptly." In construing this paper the Supreme Court said. "While the paper evidencing the contract in the case under consideration is informal, it might be treated as a lease of the premises for three years, with the privilege to the lessee to buy at any time for the amount stated in the contract." Following the principle of this decision, the contract involved in the present case was one of rental, with Mann as the landlord and the other persons as tenants, with an option to the tenants to purchase the land upon the terms and conditions stated in the writing.

The contention of counsel for the plaintiff in error is that Mann had no right to claim rent under the contract until October 15, 1910, or at least until that portion of the contract relating to the purchase of the property had been rescinded. This contention is sound. *Oxford v. Ford*, 67 Ga. 362. In that case it was held that the landlord had no right to distrain for rent before the date on which the first instalment on the agreed purchase-price was due, or at least before the date upon which the purchaser had agreed to a rescission of that part of the contract. It is argued, upon the principle of this decision, that Mann was simply an ordinary creditor as to the money and supplies which he had advanced, and, being such, he had no right to apply any portion of the cotton to this unsecured debt so as to defeat the holder of the common-law *fi. fa.* Where a creditor holds both a secured and an unsecured claim, he can not appropriate the payment first to his unsecured claim, over the objection of another creditor holding a lien upon the property or the fund from which the payment is made. Such an appropriation by the creditor would in equity amount to a payment or extinguishment *pro tanto* of his lien. *Cofer v. Benson*, 92 Ga. 793 (19 S. E. 56); *Stubbs v. Waddell*, 4 Ga. App. 264 (61 S. E. 145).

2. But we do not think this principle has any application to the present case. The contract between the owner of the land and the persons who made the crop was primarily a contract of rent with an option to buy. The relation of landlord and tenant existed

between the persons, subject to be terminated by the exercise of the option to buy the land and the payment of the first instalment due on the purchase-price. So much of the contract as related to the purchase of the land having been rescinded by mutual agreement, the relation of landlord and tenant never became terminated, and the landlord was entitled to his lien both for supplies and for rent. His claim for both being superior to the claim of the holder of the common-law fi. fa., he had a right, as against the holder of that fi. fa., to appropriate the cotton which had been delivered to him, first in satisfaction of the lien for supplies and advances, and to credit the remainder on the claim for rent. His claim for the balance of the rent being superior to that of the holder of the common-law fi. fa., the judge did not err in awarding the fund to the holder of the distress warrant.

Judgment affirmed.

3732. McNAMARA v. GEORGIA COTTON CO.

1. It is not necessary that an agent should have written authority to execute in behalf of his principal a contract required by the statute of frauds to be in writing, but such authority may be conferred by parol.
2. Where an executory contract for the sale and delivery of personal property at a specified time is entered into, and the seller fails to deliver the property at the time and place agreed on, demand for delivery is not a necessary condition precedent to the bringing of an action for damages by the purchaser for the breach of the contract.
3. Testimony of a witness having personal knowledge as to the market value of a commodity at a given time and place is evidence of a substantive fact, and, if undisputed, will demand a finding that the commodity was of the value fixed by the witness. In such a case the jury can not arbitrarily disregard such testimony and substitute their own opinion as to the market value of the commodity.
4. In the trial of an action for damages for the breach of a contract such as that referred to in the preceding headnote, memoranda sent by the plaintiff to its agent who negotiated the contract, indicating that the cotton described in the contract had been resold by the plaintiff, are mere self-serving declarations, and, as such, are inadmissible in support of the plaintiff's contention that an actual delivery of the cotton was contemplated.
5. A contract apparently legal on its face may be shown to have been founded upon an illegal consideration. Where two parties enter into a contract, under the terms of which one agrees to sell and deliver at a certain time and place, and the other agrees to take and pay for cotton of a described quantity and quality, parol evidence is admissible to

show that neither of the parties contemplated delivery of the cotton, but that the contract was intended as a mere speculation upon chances, to be settled upon the difference between the agreed price and the market value at the time and place fixed for delivery.

6. Applying to the facts of the present case the principle stated in the last preceding headnote, the court erred in directing a verdict in favor of the plaintiff.

DECIDED MARCH 6, 1912.

Action on contract; from city court of Ashburn—Judge Tipton. January 18, 1911.

Haygood & Cutts, for plaintiff in error.

J. T. Hill, J. H. Pate, J. W. Dennard, contra.

POTTLE, J. The Georgia Cotton Company sued McNamara for the breach of a contract alleged to have been contained in three letters. The following is a copy of one of these letters:

"Fitzgerald, Ga., May 19, 1909. Mr. J. W. McNamara, Rebecca, Ga. Dear Sir: In consideration of one dollar in hand paid, and for value received, we beg to confirm having purchased of you to-day, as follows. one hundred bales (100) of cotton, basis good middling, Savannah classification, at ten and one-quarter cents (10 1/4) per pound f. o. b. Rebecca, Georgia. This cotton to be delivered to us in good merchantable condition, and reweighed, during the month of November, 1909, not later than the 25th day. This cotton to average in weight between four hundred and eighty (480) and five hundred and twenty (520) pounds per bale. Ruling differences between grades at the time of delivery to apply. Please confirm." Signed: Georgia Cotton Co., Thos. Nesbitt.

At the bottom of the letter appeared the following:

"Rebecca, Ga., May, 1909. Dear Sirs. I confirm the above contract and will deliver the cotton as above agreed." Signed: J. W. McNamara.

At the trial the judge directed a verdict in favor of the plaintiff, for an amount representing the difference between the purchase-price agreed on and the market value of the cotton at the time and place of delivery as shown by the evidence. The defendant has sued out a direct writ of error, complaining of this ruling.

1. The contract sued on is in substantially the same form and language as that involved in *Terry v. International Cotton Co.*, 136 Ga 187 (70 S. E. 1100). The letter addressed to the defendant contained an offer to buy from him, upon the terms stated in the letter, cotton of the character therein described. The writ-

ten confirmation and acceptance by the defendant completed the contract, and it thereafter became binding on both of the parties thereto. When the contract was offered in evidence the defendant objected to its introduction, upon the ground that it did not appear that Thomas Nesbitt, who purported to have signed the letter in behalf of the plaintiff, had written authority from the plaintiff to execute the contract. Substantially the same objection was made to the writing in the case of *Terry v. International Cotton Co.*, supra. The point in that case was raised by demurrer. The Supreme Court held that the petition was not demurrable either on the ground that the contract declared upon was unilateral, or that it was too vague, uncertain, or incomplete to satisfy the requirements of the statute of frauds, or that it constituted a mere option and did not show who were the parties to it. There was no merit in this objection. "There is no statute in this State requiring the authority to make the memorandum required by the statute of frauds to be in writing, and such authority may be conferred by parol." *Brandon v. Pritchett*, 126 Ga. 286 (1), (55 S. E. 241, 7 Ann. Cas. 1093). It appeared, from the testimony, that Nesbitt was manager for the Georgia Cotton Company at its branch office at Cordele, Georgia; that he had been representing the company for several years; that it was engaged in the business of buying and selling cotton; and that he had general authority to represent his principal in and about its business. This evidence was sufficient to have authorized the admission of the writings sued on.

2. It is contended that the evidence was not sufficient to authorize the verdict, because there was no proof of a demand for the delivery of the cotton prior to the date fixed in the contract for delivery, or prior to the bringing of the suit. The defendant answered, admitting that before the bringing of the suit the plaintiff had demanded payment of the amount of damages which it claimed to have sustained by reason of the defendant's breach of the contract, but stated that whether any demand was made for the delivery of the cotton the defendant "is unable at this time either to admit or deny." This is probably an evasive answer, and should be taken as an admission of the allegation that demand was made. The defendant states no reason why he was unable to admit or deny that demand was made upon him for the delivery of

the cotton. He ought to have known whether demand was made or not, and he ought to have answered this allegation directly, or at least by assigning some reason why he was unable to admit or deny. See *Raleigh & Gaston R. Co. v. Pullman Co.*, 122 Ga. 700 (5), (50 S. E. 1008). But we do not think any demand was necessary in a case of this character. The obligation of the defendant was to deliver to the plaintiff a certain described quantity and quality of cotton by a certain date, at a certain place. His failure to comply with this obligation was a breach of his contract. The suit to recover damages alleged to have accrued on account of this breach was a sufficient demand under the law. It was not necessary that the plaintiff should have, prior to the bringing of the suit, sought out the defendant and in terms demanded that he comply with his contract.

3. It is further contended that the direction of the verdict was error because, while there was direct, uncontradicted evidence as to the market value of the cotton at the time and place of delivery, nevertheless the jury were not bound by the testimony of a witness as to market value. It is contended that this was opinion evidence, and that the jury would have had a right to disregard the opinion of this expert witness and substitute their own opinion as to the market value of the cotton. While testimony as to market value does involve the opinion of the witness as to what a particular commodity is worth, at the same time it is not such an opinion of a witness testifying as an expert as that the jury would have a right to absolutely disregard it, where it was uncontradicted. The witness in this case was engaged in the business of buying and selling cotton; he was familiar with the market price of cotton at the place of delivery fixed in the contract; this familiarity was gained by him and this opinion was entertained by him by reason of the fact that he was engaged in the business of buying and selling cotton, and had personal knowledge as to the market value of the commodity at the time and place of delivery stipulated in the contract. In our opinion, this was testimony of a substantive fact, and, being wholly uncontradicted, the jury would have had no right to disregard it.

The plaintiff in error relies upon the case of *Baker v. Richmond City Mill Works*, 105 Ga. 225 (31 S. E. 426), to the effect that the jury were not bound by the testimony of an attorney as an

expert as to the value of the services of another attorney in a particular case. What has been said above sufficiently distinguishes this case. The case last referred to was cited with approval in *A., B. & A. Ry. Co. v. Howard*, 125 Ga. 478 (54 S. E. 530), which involved the question of the market value of certain cross-ties. The witness there testified that the market price of the cross-ties in Brunswick was *about* forty-four cents. In commenting upon this testimony, Mr. Justice Evans said that in the first place it was not to be regarded as positive and unequivocal proof that the article had the exact value stated by the witness, but that it was merely an expression of an opinion on the part of the witness. He then added: "But it is a mistake to suppose that the opinion of an expert witness on the subject is absolutely binding on the jury, and it is error to direct a verdict upon any such supposition." The learned Justice was evidently dealing with this witness as an expert, and not only as an expert, but as a witness who was unwilling to risk his opinion far enough to make an exact statement as to the market value of the commodity. That the Supreme Court did not intend its ruling to go to the extent claimed by the defendant in error is evidenced by the fact that in the case of *Watson v. Hazlehurst*, 127 Ga. 298 (56 S. E. 459), the court affirmed the direction of a verdict involving the market value of cotton on a particular date in the city of Savannah, solely upon the testimony of a witness that it was worth a certain price. The case last referred to was an action for damages for the breach of a contract similar to the one under investigation in the present case. The case differs from *Martin v. Martin*, 135 Ga. 162 (68 S. E. 1095), and *Minchew v. Nahunta Lumber Co.*, 5 Ga. App. 154 (62 S. E. 716), where it was held that the jury were not bound by the opinion of a witness as to the value of specific property directly involved in the trial. In cases of this character there may be, and usually is, proven data from which the jury might form an independent estimate as to value. But where the issue is as to the market value of a commodity at a place other than that of the trial and at a time long anterior thereto, how can it be said that the jury can arbitrarily substitute their mere speculative opinion for the positive and uncontradicted testimony of a witness who professes to know what the market value was at the time and place in question. For instance, suppose that in a case tried in Georgia in 1912 the ques-

tion of the market value of wheat in Chicago in 1900 was in issue, and a witness familiar with the Chicago market at that time testified unequivocally to the value of the wheat, would a Georgia jury, without any data whatever, be permitted to disregard this testimony and substitute its own opinion? We think not, nor do we think the authorities require a contrary ruling. See *Atlantic Coast Line R. Co. v. Harris*, 1 Ga. App. 668 (57 S. E. 1030).

4. The court admitted in evidence, over objection of the defendant, certain letters written by an officer of the plaintiff to another officer in Cordele. These letters contained memoranda which indicated that the cotton bought from the defendant had been resold by the plaintiff. Evidence of this character would be material on the question as to whether actual delivery of the cotton was contemplated by the parties, and would be a circumstance tending to show that the plaintiff did expect delivery of the cotton, but the evidence offered to prove this fact was not admissible for this purpose. The letters were merely self-serving declarations on the part of the plaintiff, and were, consequently, inadmissible to prove the fact sought to be established.

5, 6. But we do think the court erred in directing a verdict in favor of the plaintiff. The defendant pleaded that the contract sued on was intended by both parties to be simply a speculation in futures; that actual delivery of the cotton was not contemplated, and that the parties expected to settle with each other upon the difference between the purchase-price and the market value at the time and place of delivery. In the recent case of *Luke v. Livingston*, 9 Ga. App 116 (70 S. E. 596), it was held: "Parol evidence is competent to show that a written contract apparently relating to an actual sale of cotton was in fact entered into merely for the purpose of allowing the parties to deal in cotton futures." The defendant testified as follows: "Prior to the making of these contracts, early in the season, we agreed to do some future business. The way we agreed, he was to do one side and me the other; one to buy and one to sell. The writings were to be fixed up some later day. When we made such future contracts they were to be discharged by the difference, to be paid in money. What was said was that if he lost he was to pay, and if I lost I was to pay. These three letters put in evidence, dated May 19, June 30, and July 7, 1909, under which I wrote the confirmation, were in pursuance of that conversation,

and followed it up." It is very clear to our minds that if the jury should credit this testimony, they would be obliged to find that both the defendant and Nesbitt, the manager of the plaintiff company, understood and agreed that no actual cotton was to be delivered, and that the contract was made in pursuance of a mere speculative venture, obnoxious to the law. We therefore send the case back, that it may be submitted to the jury upon the issue as to whether or not actual delivery of the cotton was contemplated; in other words, whether the writings spoke the truth, or whether, notwithstanding the actual agreement to deliver expressed in the face of the writings, it was nevertheless understood and agreed by both parties, at the time the contract was entered into, that actual delivery of the cotton would not be required, but that the parties would settle simply upon the difference existing at the time of delivery between the market value of the cotton and the purchase-price as fixed in the contract. See *Farmers Oil Co. v. Rosenthal*, ante, 416 (73 S. E. 428).

Judgment reversed.

3734. GEORGIA SOUTHERN & FLORIDA RAILWAY CO. v. KELL.

HILL, C. J. The statutory presumption of negligence, arising on proof of killing by the running of the locomotive and cars of the railroad company (Civil Code (1910), § 2780), was not fully rebutted. No error of law is complained of, and the judgment refusing to grant a new trial must be

Affirmed.

DECIDED MARCH 6, 1912.

Action for damages; from city court of Tifton—Judge R. Eve. September 9, 1911.

John I. Hall, J. E. Hall, M. P. Hall, Fulwood & Murray, for plaintiff in error.

Ridgdill & Griner, J. H. Pate, contra.

3736. PATAPSCO SHOE CO. v. BANKSTON.

1. Where a seller of goods, by fraudulent misrepresentations as to the contents of the written contract of sale, induces the purchaser to sign it without reading it, by creating an emergency on account of which the purchaser does not have time or opportunity to inform himself of the contents of the writing, the contract is not enforceable against him.

2. The mere fact, however, that the purchaser signed the contract under such an emergency without ascertaining its contents will not authorize him thereafter to repudiate it, in the absence of fraudulent misrepresentations or conduct on the part of the seller which misled the purchaser as to the contents of the writing.
3. Applying to the facts of the present case the principles laid down in the preceding headnotes, the court erred in allowing the amendment to the defendant's answer and in granting a new trial.

DECIDED MARCH 6, 1912.

Complaint; from city court of Ocilla—Judge Oxford. August 18, 1911.

Newbern & Meeks, for plaintiff. *R. M. Bryson*, for defendant.

POTTLE, J. This was a suit brought by a seller of goods upon a contract signed by both parties, to recover the purchase-price. The contract stipulated that the price should be due within ten days. Over objection of the plaintiff, the court allowed a plea setting up that there was a custom in the locality in which the defendant did business to allow sixty days on purchases of this character; that the agent for the seller knew of this custom, and that he presented the contract to be signed, containing a stipulation that the price should be due in ten days, stating at the time that he had to catch a train which was about to leave, and that the defendant, on account of this emergency, signed the contract, supposing that it contained the stipulation allowing him sixty days credit. At the trial, defendant testified that when the plaintiff's agent came to him to take the order for the shoes, he was waiting on a customer, and the agent said that he had only a few minutes in which to catch a train. He told the defendant to sign the order quickly, as he was in a hurry to catch the train, and the defendant took it for granted that the shoes were sold to him on the terms on which everybody sold them, and signed the contract. The defendant never bought any shoes in his life, so he testified, unless on sixty days time, and sometimes six months, except on one occasion, when he bought on thirty days credit. When the goods arrived the defendant declined to receive them, paid the freight on them, and shipped them back to the plaintiff. There was other testimony, of a witness for the defendant, to the effect that so far as the witness knew, shoes were always sold in the locality in question upon a credit of from sixty days to six months, but the witness could not testify that all buyers got the same terms. At the conclusion of the evidence the court directed a verdict in favor of the plaintiff, for the full amount

sued for. The defendant filed a motion for a new trial, containing the general grounds and some special assignments of error. The judge granted the motion for a new trial and set aside the verdict which he had previously directed. The plaintiff excepted to this judgment, and also to the judgment allowing the amendments to the defendant's pleas.

1. The first conclusion of the trial judge was correct. The evidence demanded a verdict in favor of the plaintiff. One who can read must read, or take the consequences of his failure to do so. A purchaser of goods has no right to rely upon the representation of the seller as to the contents of the contract of sale, and can not be relieved of the consequences of his own neglect in failing to ascertain the contents of the writing, unless the seller creates an emergency or does some act which prevents the purchaser from reading the contract. *Walton Guano Co. v. Copelan*, 112 Ga. 319 (37 S. E. 411, 52 L. R. A. 268). But if the seller fraudulently misrepresents the contents of the writing and at the same time creates an emergency, or does some act which prevents the purchaser from reading the contract, the purchaser is not bound. *Wood v. Safe Co.*, 96 Ga. 120 (22 S. E. 909); *McBride v. Telegraph Co.*, 102 Ga. 422 (30 S. E. 999).

2. But in order for the purchaser to be relieved, two things must concur: (1) there must be a fraudulent misrepresentation by the seller, acted on by the purchaser; and (2) the seller must do something which would relieve the purchaser of the duty resting upon him to read the contract himself and ascertain its terms. *Chandler-Blackstock Mercantile Co. v. Price*, ante, 383 (73 S. E. 413). In the present case it is not alleged that the seller made a misrepresentation of any character. The defendant relies solely upon the fact that he signed the contract hurriedly because of the agent's statement that he had to catch a train, and upon a custom in the community, known to the agent, under which shoes were sold upon a credit of not less than sixty days. Neither the defendant's plea nor his proof comes up to the rules laid down in former decisions. No such fraud on the part of the agent was shown as would entitle the defendant to relief from the contract. The mere fact that a custom existed in the community under which the defendant had been permitted by other sellers to have sixty days or more within which to pay for goods which he had bought would not be

sufficient to avoid the contract. In the first place, it is not shown that this was such a universal custom as to have become, by implication, a part of the contract, and in the second place, in order to entitle the purchaser to relief, he must plead and prove some actual fraud on the part of the seller, some actual misrepresentation by which he was misled, as to the contents of the writing, and, in addition to this, some legal excuse for his failure to read it.

3. The amendments to the plea in this case should have been disallowed. The evidence for the defendant was wholly insufficient to establish any defense, and the court properly directed a verdict in favor of the plaintiff. This being so, it was error to grant a new trial.

There are some special assignments of error in the amended motion, complaining of the sustaining of a demurrer to portions of the defendant's answer. Such an assignment of error has no proper place in a motion for a new trial and can not be considered. The court properly excluded the testimony of a witness offered by the defendant to the effect that he had never bought any shoes but once that he did not have from sixty days to six months within which to pay for them, and that once he had thirty days. This evidence was wholly irrelevant and immaterial. There was no sufficient reason alleged in the amended motion for granting a new trial.

Judgment reversed.

3737. SOUTHERN RAILWAY COMPANY v. PATTON.

HILL, C. J. The undisputed evidence showed that the plaintiff's steers were killed by the running of the locomotive and cars of the defendant railroad company; and their value was proved. The presumption of negligence thus raised was not clearly rebutted, and, in the absence of any error of law, the verdict, approved by the trial judge, must be *Affirmed.*

DECIDED MARCH 6, 1912.

Action for damages—appeal; from Habersham superior court—Judge J. B. Jones. August 15, 1911.

A. G. & Julian McCurry, Harold W. Ketron, for plaintiff in error.

3739. *BAKER v. GASKINS.*

- POTTLE, J. 1. A certified copy from the tax digest is admissible to show what property has been returned by a taxpayer for taxation.
2. The circumstances proved were sufficient to authorize a verdict finding the property subject to the execution. *Judgment affirmed.*

DECIDED MARCH 6, 1912.

Levy and claim; from city court of Nashville—Judge Buie. August 25, 1911.

J. W. Powell, for plaintiff in error.

Alexander & Gary, contra.

3745. *GROOVER v. TATTNALL SUPPLY CO.*

An action upon a contract for the price of goods sold and delivered can not by amendment be converted into a suit for money had and received to the plaintiff's use.

DECIDED MARCH 6, 1912.

Complaint; from city court of Reidsville—Judge Collins. August 2, 1911.

Way & Burkhalter, for plaintiff in error. *H. C. Beasley*, contra.

POTTLE, J. Suit was brought upon an account for goods sold and delivered. Over objection of the defendant, the plaintiff was allowed to amend the petition, by alleging, in substance, that the goods described in the bill of particulars were sent to the defendant to be sold for the account of the plaintiff; and that the defendant had sold the goods and collected the money, and had failed and refused to pay over the same to the plaintiff. The objection to this amendment was that it set forth a new and distinct cause of action. We think that the objection was well taken and that the amendment should not have been allowed. The original petition was framed upon the theory that the defendant had bought the goods from the plaintiff for his own use, and had failed and refused to pay for the goods. The relation thus created was that of debtor and creditor, or purchaser and seller. The amendment converted the action into one for money had and received. It sought to create the relation of principal and agent, and to count upon a breach of contract by the defendant, under the terms of which he was to sell the goods for the plaintiff and to account to the plaintiff for the

proceeds thereof. In other words, the goods were shipped to the defendant on consignment, to be resold for the plaintiff. The defendant was to act as agent for the plaintiff and to sell the goods, collect the money, and pay over the proceeds. The issues were entirely different from those arising upon the petition as originally framed, and the cause of action was completely changed by the amendment. *Chapman v. Americus Oil Co.*, 117 Ga. 881 (45 S. E. 268); *Lamar v. Lamar*, 118 Ga. 850 (45 S. E. 671). The amendment having been erroneously allowed, the case was tried upon the wrong theory, and everything that took place after this erroneous ruling was nugatory.

Judgment reversed.

3751, 3752. FULLER *v.* INMAN, and *vice versa*.

1. In order for a mother to recover, under the provisions of § 4424 of the Civil Code of 1910, for the tortious homicide of her minor child, it must appear that at the time of the homicide she was dependent, either wholly or partially, upon the child, and that the child contributed substantially or materially to her support. In such a case the mother may recover, notwithstanding the father of the child is in life, in good health, living with the family, and exercising his parental rights up to the time of the child's death. It is the fact of contribution and dependency which creates the right of action in favor of the mother, and not the legal obligation to contribute to her support; and the contribution may be either in labor or in money.
2. It can not be held, as a matter of law, that a child six years of age, of average capacity and experience, is incapable of contributing substantially or materially to his mother's support, and to such an extent as that her support is either wholly or partially dependent upon such contribution.
3. Where a mother sues for the tortious homicide of her minor child, an allegation that the child was at the time of death between six and seven years of age is not subject to special demurrer. In such a case it is immaterial whether the child be six or seven. Nor, in such a case, where it is alleged that the child was run over by an automobile and killed, is an allegation that the child was at a point "close" to a named crossing subject to special demurrer.
4. Where a petition states the facts upon which the claim of negligence is based, a general allegation in the petition, following a statement of the facts relied upon to show negligence, will be construed to have reference to the particular facts pleaded; and, so construed, it is not subject to special demurrer.
5. In a case of the character mentioned in the preceding headnotes, an allegation that the deceased would have been a useful man to the petitioner and to the community should be stricken, on special demurrer.

6. An allegation in the petition in such a case that the deceased child contributed to the support of the plaintiff, and that she was dependent upon him, is not subject to special demurrer, when the facts upon which this conclusion is based are set forth in the petition. The general averment will be construed to have reference to the special facts pleaded.
7. There was no error in the judgment overruling the special demurrer, of which complaint was made in the cross-bill of exceptions.

DECIDED MARCH 6, 1912.

Action for damages; from city court of Atlanta—Judge Reid.
September 16, 1911.

The suit was for the alleged wrongful homicide of the plaintiff's son by the defendant. The petition was as follows:

"Georgia, Fulton County. To the City Court of Atlanta:

"The petition of Mrs. M. C. Fuller shows the following facts:

1. The defendant is Miss Jennie Inman. 2. Defendant is a resident of said State and county. 3. Defendant has damaged petitioner in the sum of twenty-five thousand dollars, by reason of the following facts. 4. On or about the 26th of March, 1911, petitioner's son, James Dewey Fuller, was killed by the motor vehicle of defendant. 5. At said time petitioner's son was on the Howell's Mill road, a public road in said county. 6. He was at a point close to a crossing known as 'Woodward's Post-office,' or 'Brooked,' same being about a mile beyond the water-works reservoir. 7. There was on the roadside at the time a wagon headed north. 8. The wagon was standing still, and the driver thereof was sitting in the same. 9. The deceased was standing behind the wagon; a young man of the neighborhood was standing on the side of the wagon toward the middle of the road. 10. This was at a point about eighty yards south of the crossing above referred to, and just a few feet north of a point where another street or road ran into the Howell's Mill road. 11. At the crossing referred to as 'Woodward's Post-office,' or 'Brooked,' were several stores and a blacksmith shop, and it was a populous country cross-road. 12. On the street which ran into the Howell's Mill road, right at the place of the killing, were a number of houses, and the place was a populous country cross-roads settlement. Just north of 'Woodward's Post-office,' or 'Brooked,' referred to, the road curved sharply to the east. 13. The deceased could not see the motor vehicle coming, because of the wagon. 14. The wagon was a top wagon and a milk wagon. 15. The motor vehicle of the defendant came around the curve without any warning by bell, horn, or other signal of any sort. The motor vehicle crossed

the crossing known as 'Woodward's Post-office,' or 'Brooked,' without any warning by bell, horn, or other signal of any sort. 16. The motor vehicle passed the group of stores without any warning by bell, horn, or other signal of any sort. 17. The motor vehicle approached the wagon and the other street and struck the deceased without any warning by bell, horn, or other signal of any sort. 18. It came at a great rate of speed. 19. Petitioner charges, the rate of speed was not reasonable, having regard to the traffic use of the highway, and that the same endangered life and limb of those upon the highway. 20. Said machine approached both of the crossings herein referred to at a greater rate of speed than six miles an hour, and the defendant approached the deceased and the wagon and the two men by it without giving any warning of any sort by the use of bell, horn, or other signal of any sort. 21. Petitioner further shows the entire action of the defendant herein was negligent. 22. The motor vehicle was being operated and run by an employee of the defendant. 23. The defendant herself was at the time in the vehicle. 24. The defendant was chargeable with the action and conduct of the chauffeur. The negligence of the chauffeur was the negligence of the defendant. 25. The deceased was free from all fault or negligence, and could not have avoided the result of defendant's negligence by the use of ordinary care. 26. Petitioner was free from all fault or negligence, and could not have avoided the result of defendant's negligence by the use of ordinary care. 27. The deceased was between six and seven years of age, and was a strong, well-grown boy for his age. 28. Deceased lived with petitioner and her husband and seven of her children. The deceased was the youngest child, and all the older children were either at work or going to school. 29. The deceased ran on errands, helped split kindling, bring in wood, helped with the cows, and generally waited on petitioner, and helped in the household work, doing all of those innumerable little things to be done in the house which a child can do as effectively, or more than a grown person. The deceased contributed to petitioner's support, and she was dependent on him. 30. As the deceased grew up, approached and reached manhood, his earning capacity would have been increased, and he would have been a valuable and useful man to petitioner and the community. 31. Petitioner sues for the full financial value of the life of the deceased. Wherefore," etc.

The defendant demurred generally and specially. The court struck paragraphs 1, 5, 8, and 19 of the petition, sustained the general demurrer, and overruled all other grounds of special demurrer. The plaintiff excepted to the judgment striking these paragraphs of the petition and dismissing it, and the defendant excepted to the refusal to sustain the other grounds of special demurrer. The judgment sustaining the general demurrer was placed upon the ground that the plaintiff's deceased child could not be said to have contributed materially and substantially to the plaintiff's support, within the meaning of the law authorizing a mother to recover for the homicide of a child. Counsel for the defendant seek to sustain the judgment upon this ground, and also upon the contention that a mother has no right of action for the homicide of her minor child while her husband, its father, is alive and in good health and exercising parental rights over the child up to the time of the child's death.

Burton Smith, for plaintiff.

Smith, Hammond & Smith, for defendant.

POTTE, J. 1. It was a settled doctrine of the common law that no one could maintain a civil action for damages on account of the death of a human being. To remedy this hardship, Lord Campbell, in 1846, introduced in the British Parliament an act to authorize the recovery of damages in cases of the wrongful homicide of a person. This act, which is known in history as Lord Campbell's act, is the basis for statutes which have been adopted in practically all the States of the American Union. The first act passed on the subject in Georgia was the act approved February 23, 1850, which provided, in substance, that in all cases where death should result under circumstances where, if death had not ensued, the person injured would have had a right of action, the legal representative of the deceased should have an action at law against the person committing the act from which death resulted, one half of the recovery to be paid to the wife and children, or the husband, of the deceased, if any, in the event the estate was insolvent. Cobb's Dig. 476. In 1856 an act was passed, applicable only to railroad companies, which provided that if a person should be killed by the negligence of a railroad company, or of any of its officers or agents, by the running of its cars or engines, a right of action to recover damages for the homicide would vest in the widow, if any, and, if

no widow, in the legal representative. Acts 1855-6, p. 155. These statutes were codified in § 2913 of the Code of 1860, which is in the following language: "A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former, or one of the latter, dies pending the action, the same shall survive in the first case to the children, and in the latter case to the surviving child or children." This law was incorporated, in the same language, in § 2971 of the Code of 1873. In 1878 the law was amended so as to provide that there might be a recovery, in any case comprehended by the statute, for the full value of the life of the deceased, as shown by the evidence, and that when the recovery was by the widow, she should hold the amount recovered subject to the law of descents, just as if it had been personal property descending to the widow and children from the decedent. There was a further amendment, to the effect that no recovery under the act should be subject to any debt or liability of the deceased husband or parent. Acts 1878-9, p. 59. The law, with the amendment of 1878, appeared in § 2971 of the Code of 1882.

It was not until 1887 that the law permitted a parent to recover for the negligent homicide of a child, or the husband to recover for the homicide of his wife. In that year the section of the Code of 1882 above referred to was amended so as to provide: "The husband may recover for the homicide of his wife; and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband, or child. Said mother or father shall be entitled to recover the full value of the life of said child. The word 'homicide,' used in this section, shall be held to include all cases where the death of a human being results from a crime or from criminal or other negligence." Acts 1887, p. 45. The law as amended by the act of 1887 now appears in § 4424 of the Civil Code (1910). Under this law the parent can recover for the homicide of a child only when the parent is dependent upon the child and the child contrib-

utes to the parent's support. The language of the statute is that recovery may be had either when the parent is dependent or when the child contributes to the parent's support, but it is settled, by the decisions of the Supreme Court, that in order to authorize a recovery, there must have been both dependency and contribution to the parent's support. *Clay v. Central R. Co.*, 84 Ga. 345 (10 S. E. 967) ; *Augusta R. Co. v. McDade*, 105 Ga. 134 (7), (31 S. E. 420) ; *Smith v. Hatcher*, 102 Ga. 158 (29 S. E. 162).

The question presented under the contention of counsel for the defendant is whether or not, when the father is in life, living with the family as its head, contributing to its support and performing all of those duties usually incumbent on the head of the family, the mother can ever be said to be, legally speaking, dependent upon her minor child for support, and the child can ever be said in such a case to contribute to the mother's support, within the purview of this statute. In other words, the argument is that the father is entitled to the earnings of his minor child, and that whenever such earnings are used to aid in the support of the family, the contribution comes, not from the child, but from the father. The statute with which we are now dealing, being in derogation of the common law, must be strictly construed. *Marshall v. Macon*, 103 Ga. 725 (30 S. E. 571, 41 L. R. A. 211; 68 Am. St. Rep. 140) ; *Robinson v. Georgia R. Co.*, 117 Ga. 168 (43 S. E. 452, 60 L. R. A. 555, 97 Am. St. R. 156). The act is partly punitive and partly compensatory. As was said by Mr. Justice Lumpkin, in *Georgia R. Co. v. Spinks*, 111 Ga. 571 (36 S. E. 855) : "So much, therefore, of the statute as confers upon parents the right to sue for the wrongful killing of a child is in large measure punitive, and hence the reason for holding that at least this portion of the homicide act should be subjected to strict construction. It is not, however, a purely penal act ; for if the General Assembly had intended that for every death resulting from crime or negligence a right of action should arise, it would have taken care to so provide, and in no case would a plaintiff be wanting. The act, therefore is, to a considerable extent, compensatory in its character." This results from the fact that the measure of damages under the statute is the full value of the life of the child, which may be, and in most cases is, largely in excess of the amount which would probably be contributed to the support of the parent ; but at the same time it is an arbitrary meas-

ure of damages, fixed by the General Assembly as compensation for the loss of this contribution to the parent's support.

The question, therefore, arises: To what extent must the parent be dependent upon the child for support, and to what extent must the child contribute to the parent's support, before the parent will have a right of action for its homicide? In one of the earliest cases in which the act of 1887 was under consideration, the Supreme Court held that the words in the statute, "who contributes to his or her support," mean that the contribution to the father or mother by the child need not be wholly sufficient, but need only be such as is in part sufficient for such support, and that the word "dependent" means wholly or in part dependent materially upon such child for support. *Daniels v. Savannah Ry. Co.*, 86 Ga. 236 (12 S. E. 365). As an illustration, the court in that case said that a mother might have several children who contributed to her support, she not being dependent on one child more than on another, but that if she were dependent upon any one of them, "wholly or partially, and he contributed to her support," she would be entitled to recover for his negligent homicide. *Augusta Ry. Co. v. Glover*, 92 Ga. 132 (18 S. E. 406). See, also, *Atlanta &c. Ry. Co. v. Gravitt*, 93 Ga. 369 (20 S. E. 550, 26 L. R. A. 553, 44 Am. St. R. 145). In *Central Ry. Co. v. Henson*, 121 Ga. 462 (49 S. E. 278), the court said: "It is well settled . . . that it is not necessary, under this section, that the plaintiff show that he or she depended alone upon the deceased for his or her entire support; but that partial dependence upon the child's labor, accompanied by substantial contribution therefrom to the maintenance of the plaintiff, is sufficient." See also *Savannah Elec. Co. v. Bell*, 124 Ga. 663 (53 S. E. 109); *Atlantic Coast Line R. Co. v. McDonald*, 135 Ga. 635 (7), (70 S. E. 249). Considering the previous decisions of the Supreme Court, this court in *Western Union Telegraph Co. v. Harris*, 6 Ga. App. 260 (64 S. E. 1123), said: "It is sufficient if the contribution made by the child in aid of the parent's necessities be a substantial contribution."

Having said in one case that the contribution must be *material*, and in another case that it must be *substantial*, it is necessary to determine what contribution or what support by the child would be material or substantial, within the meaning of the law. No fixed definite rule can be laid down which would be applicable in all cases, but each case must depend upon its own peculiar facts.

The dependence and contribution to support must not be fanciful. It must not be imaginary; it must be real; it must be actual; it must be to such an extent as substantially or materially to aid the parent. In applying this rule to the facts in particular cases, it will be helpful to examine previous decisions of the Supreme Court, in order to ascertain under what facts and circumstances parents have been permitted to recover for the negligent homicide of a minor child. For instance, in *Augusta Ry. Co. v. Glover*, supra, the court held that where a father and mother and minor children reside together and are mutually dependent upon the labor of the family for support, the minor whose labor, or the proceeds of it, comes into the common stock is to be considered as contributing substantially to the support of the mother. The suggestion made in the argument in the present case, that unless the child contributes more than he consumes, he can not be said to be, in a legal sense, contributing to his parent's support, is answered by Mr. Chief Justice Bleckley in *Augusta Ry. Co. v. Glover*, supra, as follows: "Members of the same household who live by their common labor and its proceeds have a mutual dependence one upon another. Certainly so unless it be affirmatively shown that a particular member consumes as much, or more, of the common stock than he contributes to it. Even that would not be a conclusive test, for the services of a child to a mother or of a mother to a child may well be reckoned as contributing substantially to the support of the recipient far beyond any money value which the services may have, and the chief element of dependence may be in respect to personal services of this nature." The learned Chief Justice further suggested that "in the case of laboring people some regard must be had to the probability of future dependence of an older member of the family upon younger ones;" that in the natural order of human events old age would overtake the parent; that the child was one of the props and stays which nature had provided; and that when this prop was removed, the law demanded at the hands of the wrongdoer, for the benefit of the parent, the full value of his life. In *Atlanta &c. Ry. Co. v. Gravitt*, supra, it was held that a boy who worked with his father on the farm, and rendered services to his mother about the house in the performance of her household duties, contributed substantially to the support of his mother, and she was, in a legal sense, dependent upon him. In *Central Ry. Co. v.*

Henson, supra, it appeared that the child actually earned some money which contributed to a material extent to the support of the parent. Of course, if the parent actually has an income of his own sufficient to maintain him, from whatever source derived, he can not be said to be dependent either wholly or in part upon the labors of his child. *Savannah Elec. Co. v. Bell*, supra; *Atlantic Coast Line R. Co. v. McDonald*, supra. It is utterly immaterial that the child does not earn sufficient money to support himself. If the mother gets the benefit of what he does earn, or of his labor, and she is dependent upon such labor or earnings for support, she has a right to recover for his negligent homicide. This was directly held in the case last cited. The statute contemplates present support. It does not deal with the past or the future. The child must have been actually contributing to the support of the parent at the time of its homicide, and the parent must have been dependent, either wholly or in part, upon the child at that time, in order to authorize a recovery. *Smith v. Hatcher*, supra. In *Georgia R. Co. v. Spinks*, 111 Ga. 571 (36 S. E. 855), the rule is stated thus: "Where a family of working people, including parents and a minor child, were mutually dependent upon the labor of one another for a living, and the child rendered valuable services of which the mother got the benefit, she was dependent upon him if he thus contributed to her support." The statute contemplates individual dependence, and hence it was held, in the case last cited, that a father could not recover for the homicide of his minor son where the earnings of the parent were sufficient to support himself, although he was compelled to expend a large portion of these earnings in the support of other members of his family, and the deceased child contributed to the support of the family. The difference between mother and father is that in most cases the father is self-sustaining, whereas the mother attends to the household duties and performs those acts usually incumbent on a mother, and does not contribute any money toward the family's support. The statute recognizes the superior claims of the mother, because the father can sue only in the event there is no mother. The statute, therefore, is a recognition of the fact that the mother is the parent who is usually dependent upon other members of the family for support.

Generally speaking, it is true that a minor child who has not been emancipated by his father has no legal title to his earnings; that the

fruits of his labor belong to his father, and that in a strict technical sense, when such a child expends his earnings, with the consent of his father, for the benefit of some one else, this is a contribution from the father. But clearly the statute under consideration in the present case is not dealing with contribution in this legal sense. The child need not contribute any money to the support of the mother, in order to authorize a recovery by her. If he performs substantial services, of which she receives the benefit in and about the household, this is contribution to her support, and she is dependent upon that child, within the meaning of the law, without reference to whether he contributes one penny to her support. The statute deals with fact, not theory. It is the fact of contribution and the fact of dependency which create the right of action. It is utterly immaterial that the father may be legally entitled to the minor child's earnings and may be legally entitled to the fruits of his labor; if a dependent mother actually gets the benefit of the child's earnings, or of the child's labor, either with or without his father's consent, she is dependent upon that child in a legal sense, and the child materially contributes to her support, within the meaning of the statute. As was so well expressed by Mr. Justice Cobb in *Savannah Electric Co. v. Bell*, supra, "It is not necessary, under the statute, that the child contributing to the support of the parent should be under any legal obligation to make the contribution. It is the fact of contribution, and not the legal obligation to make it, that the statute makes the ingredient of the cause of action. *Daly v. New Jersey Co.*, 155 Mass. 5."

The logical result of the argument of counsel for the defendant in error is that in no case where the father is in life, living with the family and performing the duties of the head of the household, can the mother be said, under any circumstances, to be dependent upon the services of her minor child, nor can he be said to contribute to her support. To give the statute this construction would defeat its primary object and withdraw this protection from the very parent whose welfare the General Assembly was most solicitous to conserve. We are very clear, both upon precedent and principle, that no such construction of the statute is admissible, and we hold that when, in a case of this character, the mother brings suit, she is entitled to maintain her action, if she can show that the child was at the time of his death materially or substantially contributing

to her support, and she was wholly or partially dependent upon such contribution, without reference to the fact that the father may be alive, in good health, and exercising his parental rights over the child up to the time of its death. The right of the parent to recover for the homicide of a child upon whom he or she is dependent is wholly independent of the claim of the father for the loss of the child's services. Both causes of action may exist at the same time. *Augusta Ry. Co. v. Glover*, supra.

The question whether, in a given case, the child contributes substantially or materially to his parent's support, and the parent is dependent on that child, within the meaning of the statute under consideration, is a question of fact to be determined by the jury. In view of the fact that pecuniary contribution is not essential, it can not be said, as a matter of law, that the facts alleged in the plaintiff's petition in the present case were not sufficient to entitle her to go to the jury upon this question.

2. The next question is whether or not the judgment dismissing the petition can be sustained upon the theory that, as a matter of law, a child between six and seven years of age can not be said to contribute to the parent's support, and the parent can not be said to be dependent wholly or partially upon such child, within the meaning of the statute upon which the suit is based. As petitions are construed most strongly against the pleader, the allegation that the deceased was between six and seven years of age will be held to mean that the deceased was slightly more than six years of age. There are exceptional cases in which courts might hold, as a matter of law, that a child has no earning capacity and can not contribute substantially to the support of anybody. Courts can not shut their eyes to matters of common knowledge, such as the fact that an infant in arms can not materially contribute to another's support. On the other hand, courts judicially know that children of certain ages, in good health, of average capacity, are capable of contributing to the support of their parents. Between these two extremes the line must be drawn somewhere, and there is a point where the courts will not undertake to determine the question as a matter of law, but will leave it to be solved by the jury as an issue of fact. Many cases have been considered by the Supreme Court where suits have been brought under this statute for the negligent homicide of a minor child, and where actions have been

brought by a father under the common law, to recover for loss of earnings of his minor child. In *Sugarman v. Atlanta Ry. Co.*, 94 Ga. 604 (21 S. E. 581), a father sought to recover for loss of services of a girl not quite five years old at the time she was killed. The court sustained a general demurrer to the petition, and the Supreme Court reversed this judgment, holding that a cause of action was set forth in the petition. While it does not appear that the point as to the age of the child was expressly made, the judgment holding that a cause of action was set forth could mean nothing less than that in the opinion of the Supreme Court it was a question for the jury to say whether or not the plaintiff's child was old enough to render valuable services. In *Atlanta &c. Ry. Co. v. Gravitt*, supra, the suit was by the father, and the boy killed was eleven years old. In *Southern Ry. Co. v. Covenia*, 100 Ga. 46 (29 S. E. 219, 40 L. R. A. 253, 62 Am. St. R. 312), it was held that the court would take judicial cognizance of the fact that an infant only one year and eight months and ten days old was incapable of rendering valuable services. In *Atlanta Ry. Co. v. Arnold*, 100 Ga. 566 (28 S. E. 224), the court, by four Justices (one dissenting and one being disqualified), applied the rule laid down in the *Covenia* case to a child between two and a half and three years old. In *Crawford v. Southern Ry. Co.*, 106 Ga. 870 (33 S. E. 826), a father brought suit to recover for the homicide of a minor daughter four and one half years of age. The court held that it was a question for the jury to determine, whether the child was capable of rendering services of a pecuniary value. The following language of Mr. Justice Fish states the rule of the Supreme Court upon the question now under consideration: "It is easy enough for a court to decide, as a matter of law, that any child of a given age is incapable of rendering valuable services, notwithstanding the allegations of a petition may be to the contrary, where the age in question is such that, according to all human observation and experience, it would be utterly preposterous to believe that a child who had not passed beyond that age could render such services. For instance, no sensible man believes that any child a year old can perform service of value to its parents. But by gradually increasing the age we must, sooner or later, arrive at an age which is debatable ground, where reasonable minds will differ in opinion upon the question whether any child of that particular age can render service of pecu-

niary worth. Just when that debatable ground will be reached, it is, in the very nature of things, impossible to determine. When the line is reached where it seems possible that reasonable minds may begin to differ upon this question, the only course for a court to pursue is to leave the determination of the question to a jury." In *Central Ry. Co. v. Motz*, 130 Ga. 414 (61 S. E. 1), the child was nine years of age. In *Atlantic Coast Line R. Co. v. McDonald*, 135 Ga. 635 (70 S. E. 249), it was held that a mother might recover for the tortious homicide of her nine-year-old son. In *Stamps v. Newton County*, 8 Ga. App. 229 (68 S. E. 947), the action was by a mother and the child was five years old. A verdict in favor of the defendant was sustained, and no point was made as to the age of the child; but in that case counsel for both sides, and this court, seemed to have accepted the theory that it would have been a question for the jury to say whether or not a child of such an age was capable of contributing substantially to the mother's support. Upon the authority of these decisions, it can not be said, as a matter of law, that the plaintiff's son was incapable of rendering services which would materially or substantially contribute to his mother's support.

It is said, however, that because it has been held that a father may recover upon his common-law right for loss of services of a child of tender years, it does not follow that a parent may recover, under the statute now under consideration, for the tortious homicide of a child of the same age. In other words, it is argued that there is a distinction between earning capacity and the ability to contribute substantially or materially to the parent's support. We do not think there is any rational distinction between the two cases. In the suit by the father upon his common-law right of action, the test is the earning capacity of the child. In such a case it is immaterial whether the child is actually earning anything or not. For instance, the father may recover for the loss of services of a child wrongfully killed while he is attending school and wholly a charge upon the parent. In a case like the present, however, it must appear that the child is actually contributing to the parent's support, and that the parent is actually dependent, either wholly or partially, upon the child's labor. It would make no difference how great the earning capacity of the child might be, if he was not actually contributing to his parent's support, the action would fail. A boy of

eighteen, attending college and capable of earning a considerable amount of money, but not actually earning a penny, might be wrongfully killed, and in such a case neither the father nor the mother would have a right of action for his tortious homicide under this statute. But the father would have a right to recover for loss of services up to the time the child became twenty-one years of age, without reference to whether he was actually earning a single penny. This marks the distinction between the two cases, and the only distinction. A child who has earning capacity is capable of contributing materially to the support of his parent, within the meaning of the statute with which we are now dealing; and if such a child actually puts his earning capacity into operation, either in the form of labor for his parent, or by contributing to the parent the proceeds of labor which he performs for some one else, he is contributing substantially to the parent's support. Under the allegations of the petition in the present case, it was a question for the jury whether or not, at the time the plaintiff's son was killed, he was actually contributing to his mother's support and she was wholly or partially dependent upon him for support. The learned trial judge should not have decided this question upon demurrer, as a matter of law, adversely to the plaintiff, but it should be submitted to the jury as an issue of fact.

3. The special demurrer is rapidly outliving its usefulness. The law looks at substance rather than form. The legitimate function of a special demurrer is to compel the pleader to disclose whether he really has a cause of action or defense. The requirement that a plaintiff shall "plainly, fully, and distinctly" set forth his ground of complaint does not mean that he shall disclose the evidence upon which he relies, or indulge in needless particularity, but means only that his demand shall be set forth in terms sufficiently full and distinct to enable the court to determine whether a cause of action exists, and his adversary to understand the exact nature of the claim made against him. It is a useless consumption of time to try a case where the plaintiff really has no lawful complaint; and so he must disclose his charge with sufficient particularity to set this question at rest. For instance, if the suit is by a parent to recover for the homicide of a minor child, a general averment that the child was a minor would not be sufficient; because if the child was one or two years old, the court would hold that

the plaintiff had no cause of action. But an allegation that the child was between six and seven is sufficient, because it is immaterial, for purposes of pleading, whether the child was six or seven. And likewise as to an allegation that the child was at a point "close" to a certain crossing, since this was mere matter of description, it being immaterial to the cause of action whether the child was near or upon the crossing.

4. A general allegation of negligence is a mere conclusion. The conclusion may be wrong; and, therefore, the particular facts relied upon to support the conclusion should be pleaded. It is permissible, however, to set forth the facts, and then conclude that these facts amount to negligence. Demurrer will then raise the question whether the conclusion is good in law. As applied to the present case, the allegations were that the defendant failed to give warning of the rapid approach of the car. We construe the averment in paragraph 21 to mean that the defendant was negligent in this respect. So construing it, it was not subject to demurrer.

5. The averment in paragraph 30, that the deceased would have been a useful man to the petitioner and the community, was irrelevant. The question is: Was the deceased at the time of his death substantially contributing to his mother's support, and was she wholly or partially dependent upon him? He may have become a useful man both to his mother and the community, and still she might not have been dependent upon him.

6. The averments in paragraph 29 are proper subject-matter of proof. If the mother was dependent upon the child's labors for assistance such as that here described, the jury should be allowed to consider this fact along with the other evidence in the case. The averment that the deceased contributed to the petitioner's support, and that she was dependent on him, was intended to be supported by the other allegations in paragraph 29; and, so treated, it is sufficient.

7. We have carefully read the special grounds of demurrer, to the overruling of which exception is taken in the cross-bill, and none of them seem to us to be meritorious. It is not necessary to allege on which side of the road the wagon was standing. This was mere matter of inducement, and was averred simply to show why the deceased did not see the automobile approaching, the reason being that he was behind the wagon.

The allegations in paragraph 15 and 16, that the driver of the car failed to give any warning by bell, horn, or other signal, was sufficient. The act of 1910 in relation to the operation of automobiles requires that the person operating the machine "shall give reasonable warning of its approach by the use of a bell, horn, gong, or other signal, and use every reasonable precaution to insure the safety" of pedestrians and animals on the roadway. Acts 1910, p. 92. It was sufficient to allege that the defendant had violated this requirement of the act. The allegation was a statement of fact, and not a conclusion.

The act further provides that an automobile shall not be operated upon any of the highways "of this State . . . at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life and limb of any person or the safety of any property, and upon approaching a bridge, dam, high embankment, sharp curve, descent, or crossing of intersecting highways and railroad crossings, the person operating a machine shall have it under control and operate it at a speed not greater than six miles per hour." The petition alleged that the motor car came around a curve without warning. It is averred generally in paragraph 18 that it came at a great rate of speed, and in paragraph 19 the plaintiff charges that the rate of speed was not reasonable or proper, having regard to the traffic use of the highway, and that the same endangered life and limb of those on the highway, and that the machine approached the crossing referred to in the petition at a greater rate of speed than six miles an hour. Taking these allegations all together, they were not subject to demurrer. Properly construed, the plaintiff intended to aver that the machine was running slightly in excess of six miles an hour (because the allegation must be taken most strongly against her); and she concludes that this rate of speed was not reasonable or proper. Under the facts alleged, it was negligence to run the machine at a greater rate of speed than six miles per hour and without giving the warning which the law requires. The allegations were sufficiently specific as against demurrer.

The averment that the defendant was chargeable with the conduct of her chauffeur was surplusage and harmless. Under the facts alleged, the law would charge the defendant with the consequences of the negligent act of her agent—the driver. The same

observation applies to the allegation in paragraph 24 to the effect, that the negligence of the chauffeur was the negligence of the defendant.

The averment that the deceased and the petitioner were free from fault and could not have avoided the result of the defendant's negligence by the use of ordinary care is not a conclusion of the pleader, but an allegation of a substantive fact.

The allegation in paragraph 30, that the deceased's earning capacity would be increased as he grew older, is a statement of fact, and is sufficiently definite in pleading. It is subject, however, to the objection that the plaintiff failed to allege anywhere in the petition that the deceased had earning capacity. While there is no direct allegation to this effect in the petition, there are averments from which the conclusion is properly reached that the deceased did have earning capacity and did contribute to his mother's support. Our conclusion is that the court erred in sustaining the general demurrer, but committed no substantial error in his rulings upon the special demurrers. The result is that the judgment on the main bill of exceptions will be reversed, and on the cross-bill affirmed.

Judgment on main bill reversed; on cross-bill affirmed.

3753. CENTRAL OF GEORGIA RAILWAY CO. v. ROUNTREE.

- HILL, C. J. 1. The written requests to charge so far as applicable, are fully and clearly covered by the general instructions to the jury.
2. The excerpts from the charge of the court, considered in connection with the charge as a whole, contain no error.
3. The law of comparative negligence and consequent diminution of damages, embodied in the Civil Code (1910), § 2781, was correctly charged, and the size of the verdict indicates that it was applied to the evidence by the jury, favorably to the defendant.
4. No error appears, and the evidence fully supports the verdict.

Judgment affirmed.

DECIDED MARCH 6, 1912.

Action for damages; from city court of Sandersville—Judge Jordan. September 27, 1911.

F. H. Saffold, J. J. Harris, for plaintiff in error.

Goodwin & Wood, contra.

3756. MICHIGAN MUTUAL LIFE INSURANCE CO. v. PARKER.

- POTTE, J. 1. Hearsay evidence has no probative value.
2. Agency can not be shown by the mere declarations of the alleged agent.
3. Where suit was brought by a life-insurance company upon a promissory note given for a premium due upon a policy of insurance, and the defense was that an authorized agent of the plaintiff had accepted a return of and cancelled the policy and relieved the defendant from the obligation to pay the unearned portion of the premium, it was error to admit in evidence, over objection duly made, a letter purporting to have been written by the alleged agent, from a place other than the home office of the company, to a third person, upon stationery of the company, to which letter the writer signed his name as "general agent" of the plaintiff. Such a letter was, at most, only a declaration of agency by the alleged agent. Nor did the letter have any probative value because in the heading were printed the name of the plaintiff and the name of the alleged agent, with the words "general agent" after his name, there being no proof that the plaintiff had authorized the publication and use of such stationery. Had the letter been written from the home office of the company, and shown upon its face that it was in reply to one written by the addressee to the company, the rule might be different. *Raleigh Railroad Co. v. Pullman Co.*, 122 Ga. 700, 708 (50 S. E. 1008).
4. Evidence that one is employed as "general agent" of an insurance company is not sufficient, without proof as to his duties, to show authority to release a debtor from the obligation of a note payable to the company.
5. There was no evidence that the plaintiff had ratified the release of the defendant by accepting the return of the policy of insurance. A verdict in favor of the plaintiff for the full amount of the note was demanded, and the court erred in overruling the motion for a new trial.

Judgment reversed.

DECIDED MARCH 6, 1912.

Complaint; from city court of Tifton—Judge R. Eve. September 9, 1911.

R. D. Smith, for plaintiff.

Fulwood & Skeen, for defendant.

3757. WILKERSON v. PATTON SASH, DOOR & BUILDING CO.

- HILL, C. J. 1. Where one party to an alleged contract for "the sale of goods, wares, or merchandise" relies upon a written memorandum, to show compliance with the statute of frauds, the memorandum must show all the terms of the contract, and that both parties thereto assented to those terms. *Borum v. Swift*, 125 Ga. 202 (53 S. E. 698); *Clark on Contracts*, 83.
2. An acceptance of a written offer relating to a subject-matter within the statute of frauds must itself be in writing, in order to make a con-

tract mutually binding. *Pope v. Graniteville Mfg. Co.*, 1 Ga. App. 176 (57 S. E. 949).

3. The alleged contract on which the suit is based consists of a written proposal or offer to buy certain described personal property at a specified price, and the allegations of the petition show that this written offer was withdrawn before acceptance or part performance by the proposed seller. The offer, therefore, never became a complete contract, and the court properly dismissed the petition on demurrer. *Oak City Co. v. Kennedy Co.*, 4 Ga. App. 344 (61 S. E. 499); *Sivell v. Hogan*, 119 Ga. 284 (46 S. E. 67); 9 Cyc. 284. *Judgment affirmed.*

DECIDED MARCH 6, 1912.

Action on contract; from city court of Floyd county—Judge Reece. September 15, 1911.

W. J. Nunnally, for plaintiff.

Lipscomb, Willingham & Wright, Nathan Harris, for defendant.

3762. MCFARLAND v. LEE, for use, etc.

- POTTLE, J. 1. Exception to a judgment refusing to allow an amendment to an answer can not properly be made in a motion for a new trial.
2. In a suit upon a forthcoming bond, the only question to be decided is whether or not there has been a breach of the bond. No issue can properly be raised as to the title of the property involved. *Rowland v. Page*, 4 Ga. App. 269 (61 S. E. 148).
3. The evidence authorized a finding that no claim had been interposed. This being so, the bond sued upon and which was given as the foundation of a claim is to be treated as a voluntary obligation. A recital in the bond that the principal obligor claims the property is not evidence that a claim has actually been interposed, but only that the obligor intended to interpose a claim. *Jones v. Kendrick*, 94 Ga. 645 (21 S. E. 831).
4. The evidence authorized a verdict that there had been a breach of the bond by the defendant. *Judgment affirmed.*

DECIDED MARCH 6, 1912.

Action on bond; from city court of Lumpkin—Judge Nicholson presiding. September 1, 1911.

T. T. James, for plaintiff in error. *Tomlinson Fort*, contra.

3770. BIRMINGHAM FERTILIZER CO. v. COX & SON.

1. "Promissory notes are evidence of their own value, in an action of trover."
2. "In an action of trover the issue is one of title, and not of debt. Consequently, neither the defendant in such an action, wherein bail is required, nor the surety on his bond, can set up as a defense the discharge of the defendant in bankruptcy pending the action. This is true although the plaintiff elects to take a money verdict for the damages alleged to have been sustained."

DECIDED MARCH 6, 1912.

Complaint; from city court of Tifton—Judge R. Eve. September 11, 1911.

R. E. Dinsmore, for plaintiff.

J. H. Price, Fulwood & Skeen, J. J. Murray, for defendants.

POTTLE, J. The Birmingham Fertilizer Company sold fertilizer to the partnership of John A. Cox & Son, and took their note for the purchase-price. Cox & Son sold the fertilizer to planters, took their notes, transferred them as collateral security to the Birmingham Fertilizer Company, and retained the collateral notes for collection. Cox & Son having failed, upon demand, to surrender the collateral notes or to account for them, the fertilizer company brought an action of trover and bail. At the conclusion of the evidence the court directed a verdict for the defendants, and subsequently overruled the plaintiff's motion for new trial.

1. It is contended that the verdict was demanded, because there was no proof of the value of the notes sued for. "Promissory notes are evidence of their own value, in an action of trover." *Wight v. Hester*, 24 Ga. 485. As a general rule, in a trover case, the plaintiff must prove the value of the thing sued for. But where one takes for another notes for collection, he impliedly concedes their value, and, if he converts them, they should be treated, in an action for their conversion, as being prima facie of their face value. If they are in fact valueless, for any reason, such as the insolvency of the makers, this would be a matter of defense. *Citizens Bank v. Shaw*, 132 Ga. 771 (65 S. E. 81). If the plaintiff elects to take a money verdict, his measure of damages could not exceed either the amount of his debt or the prima facie or actual value of the collaterals as shown by the evidence. There was no proof that the notes were without value, and the direction of the verdict can not be

sustained upon the theory that the notes were not shown to be of value.

2. The defendants pleaded and proved that pending the action they had been discharged in bankruptcy; and this is urged to sustain the direction of the verdict in their favor. It is settled by the decision in *Berry v. Jackson*, 115 Ga. 196 (41 S. E. 698, 90 Am. St. Rep. 102), that the discharge in bankruptcy of the defendants in a trover case constitutes no defense to the action. "The issue is one of title, not of debt." The judge erred in directing the verdict and in admitting the record of the discharge in bankruptcy. There is no specific assignment of error upon the direction of the verdict, but as the motion for a new trial complains of the admission of the record of the discharge in bankruptcy, and as this was error, the judgment overruling the motion will be reversed, that the case may be tried anew in the light of the views herein expressed.

Judgment reversed.

3773. MCGHEE COTTON CO. v. HERRINE.

POTTLE, J. Suit was brought for damages for the alleged failure to deliver cotton according to the terms of a writing of which the following is a copy: "I have this day sold to McGhee Cotton Co., Rome, Ga., four (4) B/C average r's & 6's at 12 c per #, same to be delivered at McGhee Cotton Co. Warehouse, Rome, Ga., on or before November 10th, 1909, weight of cotton to be 450 to 500 # per bale." This writing was signed by Herrine. At the bottom of the writing appeared the word "Accepted," followed by the signature of the McGhee Cotton Company. The petition alleged the market value of the cotton at the time and place of delivery, the failure of the seller to deliver, and the willingness and ability of the buyer to take and pay for the cotton at the agreed price. *Held*: (1) The petition was not subject to general demurrer. (2) The writing was, in legal effect, an offer to sell upon the terms and at the time therein stipulated. *Luke v. Livingston*, 9 Ga. App. 116 (70 S. E. 596). (3) The writing showed on its face that the offer had been accepted in writing by the buyer. It thus became a mutually binding contract, valid under the statute of frauds, was not unilateral, and no tender of the agreed price prior to the date fixed for delivery was necessary. *Terry v. Cotton Co.*, 136 Ga. 187 (70 S. E. 1100). In *Mallett v. Watkins*, 132 Ga. 700 (64 S. E. 999, 131 Am. St. Rep. 226), there was no written acceptance, nor was anything done by the buyer prior to the date fixed for delivery to take the transaction out of the statute of frauds.

Judgment reversed.

DECIDED MARCH 6, 1912.

Action on contract; from city court of Cartersville—Judge Foute.
September 13, 1911.

Finley & Henson, W. A. Milner, for plaintiff.

Eubanks & Mebane, for defendant.

3777. *FLEMING et al. v. SMITH*, Governor.

HILL, C. J. Where a bond given in a criminal case was duly forfeited, and a rule nisi issued and scire facias served, and, before the term of the court to which the scire facias was made returnable, the principal voluntarily appeared in the sheriff's office in vacation, paid all the accrued costs of the forfeiture, and tendered a second bond, which was accepted and approved by the sheriff, sureties on the first bond were discharged from all further liability, and it was erroneous to enter against them a judgment absolute. Penal Code (1910), §§ 959, 960.

Judgment reversed.

DECIDED MARCH 6, 1912.

Forfeiture of bond; from city court of Hartwell—Judge Hodges.
September 1, 1911.

A. A. McCurry, for plaintiffs in error.

J. Rod Skelton, contra.

3779. *FULLER v. CLARK*.

POTTLE, J. No error of law was committed, and, the evidence being sufficient to support the verdict rendered by the jury in the justice's court, this court has neither the power nor the inclination to interfere with the judgment of the judge of the superior court refusing to sustain the certiorari.

Judgment affirmed.

DECIDED MARCH 6, 1912.

Certiorari; from Gordon superior court—Judge Fite. September 16, 1911.

G. A. Coffee, for plaintiff in error. *F. A. Cantrell*, contra.

3782. FLEMISTER GROCERY COMPANY *v.* WRIGHT MERCANTILE
AND LUMBER COMPANY.

- HILL, C. J. 1. A mere casual or temporary absence of a debtor from the State on business or pleasure will not render him a non-resident, within the meaning of the statute relating to attachments. *Stickney v. Chapman*, 115 Ga. 761 (42 S. E. 68).
2. Where an attachment was issued on the ground of non-residence, and this ground was traversed by the defendant, it was not erroneous to allow him to testify that he was only temporarily absent from the State on business, and that he intended to come back to Georgia to live. The fact of actual residence is to be determined by the ordinary and obvious indicia of residence; and where one leaves the State of his residence, his declaration that he intended his absence to be only temporary, and that he intended to return to the State of his residence, is explanatory of his conduct and is competent.
3. No error of law appears, and the facts disclosed by the record fully support the verdict in favor of the traverse of the ground of non-residence.
- Judgment affirmed.*

DECIDED MARCH 6, 1912.

Attachment—appeal; from Murray superior court—Judge Fite.
October 11, 1911.

W. W. Sampler, for plaintiff. *W. E. Mann*, for defendant.

3784. CHANCE *v.* SOUTHERN RAILWAY COMPANY.

- POTTLER, J. 1. Where a motion for a new trial was dismissed, and subsequently an order was passed vacating the dismissal and reinstating the motion, and where thereafter the motion was overruled and this last judgment was reversed by the Court of Appeals, and a new trial ordered, the respondent in the motion can not, on the second trial of the case, by a motion to "dismiss the case," for the first time call in question the validity of the order reinstating the motion.
2. The evidence in the present record being substantially different from that introduced on the former trial (*Southern Ry. Co. v. Chance*, 7 Ga. App. 650, 67 S. E. 836), and there being evidence on the present trial which was not introduced on the first trial, from which the jury could find that the noise made by the engine was both unusual and unnecessary, a nonsuit should not have been granted.

Judgment reversed.

HILL, C. J., dissenting. I do not think that the plaintiff materially strengthened his case by the additional evidence as to the character of the noise made by the engine; and, in my opinion, the present case is controlled by the prior decision of this court.

DECIDED MARCH 6, 1912.

Action for damages; from city court of Carrollton—Judge Beall. September 14, 1911.

C. E. Roop, S. Holderness, for plaintiff.

Maddox, McCamy & Shumate, S. J. & B. F. Boykin, W. P. Cole, for defendant.

3791. *BALES v. FIRST NATIONAL BANK OF DUBLIN.*

HILL, C. J. Where the payee in a promissory note sues thereon in his own name for the use of another, and the usee, before the commencement of the action, has acquired the legal title by indorsement of the note sued on, the petition is amendable by striking the name of the original plaintiff and allowing the action to proceed in the name of the usee. Civil Code (1910), §§ 5689, 5690; *Swilley v. Hooker*, 126 Ga. 353 (55 S. E. 31); *Woodbridge v. Drought*, 118 Ga. 671 (45 S. E. 266). There being no defense filed to the suit on the merits, and no question raised except as above decided, the judgment is affirmed, with ten per cent. on the amount of the judgment, as damages for frivolous appeal.

Judgment affirmed, with damages.

DECIDED MARCH 6, 1912.

Complaint: from city court of Dublin—Judge Hawkins. September 11, 1911.

Ira S. Chappell, for plaintiff in error.

Adams & Flynt, contra.

3798. *CITIZENS BANK OF VALDOSTA v. PEEPLES.*

1. Where, in a trover case, the plaintiff offers, as evidence of his title, a purchase-money note containing a retention of title to the property sued for, the defendant may, without having filed a plea of non est factum, introduce evidence to show that the note relied upon by the plaintiff as evidence of his title is a forgery.
2. Under the facts of the present case it was prejudicial error against the plaintiff to charge the jury that before the plaintiff could recover, it must have appeared, from the evidence, that the defendant was in possession of the property sued for at the time of the filing of the suit.

DECIDED MARCH 6, 1912.

Trover; from city court of Nashville—Judge Buie. October 7, 1911.

On July 15, 1908, an action of trover was brought by the Citizens Bank of Valdosta against J. P. Peeples. The defendant replevied

the property. The plaintiff claimed the property under a note containing a retention of title, alleged to have been given by the defendant to one Griffith for the purchase-price of one black, cross-eyed mare mule and one black horse, being the same property which was described in the petition. The note was dated October 30, 1907, was to become due on April 1, 1908, was transferred to the bank by Griffith on December 19, 1907, and was recorded by the bank on April 12, 1909. In paragraph 1 of the defendant's answer he denied that he was in possession of the property described in the petition, or that the plaintiff had title thereto. The same paragraph of the answer, however, contains this allegation: "Further answering said paragraph defendant alleges that he is in possession of one mouse-colored, cross-eyed mare mule, about six years old, but that he purchased same from one W. A. Griffith, and has fully paid him for same." In the second paragraph of the defendant's answer, referring to the property described in the petition, it is alleged that "he has not the said described property in his possession, and, therefore, could not deliver same." At the trial the plaintiff introduced the note in evidence, and proved the transfer on the date above mentioned, and offered evidence to show that the property described in the petition was of the value therein alleged. There was also evidence in behalf of the plaintiff that both the mule and the horse were sold by Griffith to the defendant; that the defendant took possession of the property at the time of the sale; that he executed the note containing a retention of title, and that he never paid the purchase-price. There was evidence for the defendant that he could neither read nor write, and that he did not in fact execute the note, it having been signed by his mark; that he had paid Griffith in full for the mule, and that he had returned the horse to Griffith prior to the bringing of the suit; that Griffith had accepted the horse and had disposed of it. The defendant testified, in his own behalf, that he had traded the mule described in the petition, but it does not appear, from his testimony, whether this was done before or after the filing of the suit. The jury returned a verdict in favor of the defendant, and the plaintiff's motion for new trial was overruled.

Alexander & Gary, W. A. Dodson, for plaintiff in error.

J. Z. Jackson, contra.

POTTLE, J. (After stating the foregoing facts.)

1. In the motion for new trial error is assigned upon the admission of testimony for the defendant tending to show that he had not executed the note which had been transferred by Griffith to the bank, and also upon an instruction to the jury that if they believed that the defendant had not executed the note, the plaintiff would not be entitled to recover. It is contended that inasmuch as the defendant did not file a plea of non est factum, he should not have been permitted to introduce evidence that the note was a forgery. We do not think this contention is well founded. The note was not the foundation of the plaintiff's action, within the meaning of the Civil Code (1910), § 5650. It was simply evidence of the plaintiff's title, and could be attacked by the defendant as a forgery, in the same way that a defendant in an ejectment case can show that a deed offered as evidence of the plaintiff's title was a forgery. The note was admissible in evidence, and the burden was on the defendant to show that he had not in fact executed it, but he had a right to attempt to carry this burden without having filed a plea of non est factum *Anderson v. Cuthbert*, 103 Ga. 767 (30 S. E. 244).

2. The trial judge charged the jury as follows. "The first question is, did the defendant sign the note, or authorize it to be signed for him; then you say further if he was in possession of the property at the time of the filing of the suit. If you find these questions in the affirmative, then you would be authorized to find in favor of the plaintiff." We think this charge was error, and entitles the plaintiff to a new trial. In the first place there was an admission, in the defendant's answer, that he was in possession of the mule at the time suit was filed. In the second place, it was not necessary, in order to entitle the plaintiff to recover, that the defendant should have been in possession of the property at the time of the filing of the suit. It was only essential that the plaintiff should show that it had title to the property in dispute, and that the defendant had been in possession of it at some time after the plaintiff acquired title. The only purpose of a demand in a trover case is to furnish evidence of a conversion. The defendant having admitted in his answer that he was in possession of a portion of the property, and that he had refused to deliver it to the plaintiff, and having testified that he had traded the mule, no demand was necessary, so far as the mule was concerned; because, taking the defendant's an-

swer and his testimony together, it is evident, if both are true, he must have traded the mule after the suit was filed. The trading of the mule was a conversion by the defendant, and no proof of demand was necessary to authorize the plaintiff to recover the mule or its value. So far as the horse is concerned, it does not appear exactly when the defendant delivered the horse back to Griffith. If this was done after the transfer of the note and after its record, of course this was sufficient evidence of a conversion of the horse, as against the plaintiff, and no demand was necessary. If, at the time the defendant surrendered the horse to Griffith, the defendant had no actual or constructive knowledge that the note had been transferred to the bank, he would be relieved, so far as the horse was concerned. The evidence was in sharp conflict as to whether the defendant had executed the note upon which the plaintiff relied in support of its title, and it was harmful error against the plaintiff to instruct the jury that before the plaintiff could recover, it must have appeared from the evidence that the defendant was in possession of the property at the time of the filing of the suit. For this reason the judgment overruling the motion for new trial must be

Reversed.

3799. **MACON, DUBLIN & SAVANNAH RAILROAD CO. v. SMITH,**
executor.

HILL, C. J. The statutory presumption of negligence (Civil Code of 1910, § 2780) was not fully rebutted. Besides, there were circumstances proved corroborating the presumption. *Judgment affirmed.*

DECIDED MARCH 6, 1912.

Action for damages; from city court of Dublin—Judge Hawkins.
October 3, 1911.

Minter Wimberly, Adams & Flynt, Akerman & Akerman, for plaintiff in error.

James R. Thomas, contra.

3802. BROWN v. BOWMAN.

1. The admission that a mutual benefit society, organized to do an insurance business, is a fraternal benefit order, duly licensed as such by the State, is equivalent to an admission that the order has a representative form of government and a lodge system such as is described in the Civil Code (1910), § 2866.
2. Where such a fraternal benefit order issues a policy of insurance and accepts from the policy-holder a note for the premium, it is no defense to an action on the note that the maker thereof has never had an opportunity to be initiated into one of the subordinate lodges of the order.
3. *Query*: Where an association has been duly licensed by the State as a fraternal benefit order and authorized to organize and conduct its business under the provisions of § 2866 et seq., of the Civil Code, can a policy-holder in the order defeat recovery upon a note given for the premium, by showing that the association was never organized in accordance with the provisions of the statute, and that it has no representative form of government or lodge system as therein provided?

DECIDED MARCH 6, 1912.

Certiorari; from Elbert superior court—Judge Meadow. September 21, 1911.

Lee S. Brown brought suit in a justice's court against Lewellyn Bowen, upon a promissory note given for the premium due on an insurance policy issued upon the life of the defendant by the Fraternal Life Association. The defense was that the insurance association was not a fraternal benefit order as defined by the Civil Code (1910), § 2866, because it did not have a representative form of government and a lodge system with a ritualistic form of work. The answer of the magistrate recites: "It was agreed by counsel that the Fraternal Life Association was a beneficiary order, and that it was licensed to do business as such in the year 1908, and that Lee S. Brown was the manager and joint owner of same." The defendant testified that when the policy was issued to him and when he gave the note sued on for the premium, the agent never said anything to him about it being necessary to establish a lodge, or for him to be initiated into a lodge; that so far as he knew, no lodge was ever established, and that he and many others who gave premium notes lived in the same community and talked frequently about the notes, and that they had never heard of any lodge being established by the association. Several witnesses were permitted to testify, over objection by the plaintiff, that they had given notes for premiums to the Fraternal Life Association, and that they had never been initiated into a lodge, and had never heard of any lodge being established, by the association. The defendant prevailed

at the trial. In the petition for certiorari error is assigned upon the admission of testimony of the witnesses above referred to, and also upon the ground that the verdict in favor of the defendant was contrary to law and the evidence. The certiorari was overruled.

J. T. Sisk, for plaintiff. *George C. Grogan*, for defendant.

POTTLE, J. (After stating the foregoing facts.)

It was admitted that the Fraternal Life Association had been licensed by the State to do business as a fraternal benefit order. If this is true, it is clear that the association would be estopped to deny its corporate existence, or its authority to accept contracts of insurance, in a suit brought by a beneficiary upon one of such contracts. 1 Joyce, Insurance, § 350, p. 39; 29 Cyc. 15-16. As estoppels must be mutual, it would also seem to be clear that when the duly authorized officers of the State issue a license to an insurance company to do business within the State, a policy-holder can not, in defense to an action brought upon a premium note, challenge the right of the insurance company to do business within the State or raise the point that the company had not complied with the statutes of this State so as to authorize it to execute contracts of insurance. See 2 Joyce, Insurance, § 1311; 1 Bacon, Benefit Societies, § 60. The license having been duly and regularly granted, it would seem that the right of the company to do business could be brought into question only in a direct proceeding instituted by the State.

But it is not necessary upon the present record to definitely determine this question. It was agreed that the insurance association was a fraternal benefit order. The Civil Code (1910), § 2866, defines a benefit order to be one "formed or organized and carried on for the benefit of its members and their beneficiaries, and having a representative form of government and a lodge system, with ritualistic form of work for the meeting of its lodges, chapters, councils, or other designated subordinate bodies, and the benefits, insurance, charity, or relief shall be payable by a grand or supreme body of the same, excepting sick benefits, which may also be paid by local or subordinate bodies." The evidence in the present case shows that no subordinate lodge was organized in the community where the defendant resided, and that he was never initiated in any lodge. But the law does not require the institu-

tion of a subordinate lodge in every community where a fraternal benefit order issues policies of insurance. It would, we think, be a sufficient compliance with the statute if such an order had one lodge, such as is described in the statute, at some place in the State where its members might be initiated. The fact that a particular member might not have been initiated into a lodge would not render the association illegal or invalidate its contracts. Nor do we think that the failure of the association to give a particular policy-holder an opportunity to be initiated into one of its lodges would render invalid and unenforceable either a policy of insurance issued to such member or a note given by the member in payment of a premium due on the policy. We are not prepared to hold that a policy-holder can defeat recovery on a premium note even though it should appear that the association had no lodges within the State. But so far as this case is concerned, it does not appear but that this association may have a number of lodges in different parts of the State. The admission that it was a fraternal benefit order necessarily carries with it the idea that the association has a representative form of government and a lodge system such as is described in the statute; and, this being so, its contracts will not be held to be invalid, nor will a policy-holder be allowed to defeat a premium note, solely upon the ground that he has not been initiated into one of the lodges of the association. The certiorari should have been sustained. *Judgment reversed.*

3805. HOLLIDAY v. MAYOR AND COUNCIL OF ATHENS.

1. It is the duty of a municipal corporation having control over its highways to keep them in a reasonably safe condition for travel.
2. Where municipal authorities undertake the repair or improvement of a public street, they are bound to take such precautionary measures for the protection of persons having a right to the use of the street as ordinary care and diligence would require.
3. An obstruction placed in a public street for the purpose of closing it to travel while repairs are under way must be of such a character and be maintained in such a way as to protect from danger persons who attempt to travel along the street in an ordinarily prudent manner.
4. If a person attempting to travel along a public street is injured by coming in contact with a rope stretched across the street by the municipal authorities in order to close the street for repairs, he can not recover damages from the municipality, if by the exercise of ordinary care he

could have discovered the rope in time to have avoided striking it, or if, after discovering the obstruction, he failed to exercise a like degree of diligence to avoid injury to himself.

5. If both the city and the traveler are free from fault, the injury will be attributed to accident, and no recovery can be had.
6. Where, in the trial of an action for damages growing out of a tort alleged to have been committed by the defendant, the plaintiff alleges his own freedom from fault and the defendant's negligence, and the defendant pleads its freedom from fault, and negligence on the part of the plaintiff, and there is evidence authorizing a finding that neither party was at fault, it is not error to instruct the jury upon the law applicable to accidental injury.
7. Alleged newly discovered evidence which is merely cumulative and impeaching in its character is not cause for a new trial.
8. The following charge of the court was not erroneous: "You will then determine, from the evidence, whether or not the plaintiff, at the time of discovering the obstructions, did all acts and used such precaution that a prudent man would have done and used for his own safety under similar circumstances and surroundings."
9. It was not, under the facts of the present case, error requiring the grant of a new trial to charge the jury as follows: "I charge you, as a proposition of law, that if there was anything present at the time and place of injury which would cause an ordinarily prudent person to reasonably apprehend the probability of danger to him in doing an act which he is about to perform, then he must take such steps as an ordinarily prudent person would take to ascertain whether such danger exists, as well as to avoid the consequences of the same after its existence is ascertained: and if he fails to do this and is injured, he will not be allowed to recover. if, by taking proper precaution, he could have avoided the consequences of the negligence of the defendant, if there was any negligence."
10. There was no prejudicial error in this instruction: "If, upon the other hand, the plaintiff, at the time of passing along Hancock avenue in the direction of the rope in question, was not in the exercise of that observance and lookout for defects or obstructions in the street that a prudent man would have exercised under similar circumstances or surroundings, then he was not in the exercise of that care which the law required him to exercise for the discovery of danger; and if injured, his injury would be attributable to his own negligence; or if, after discovering the obstruction, he failed to do those acts and use that precaution that a prudent man would have done and used to prevent the accident and for his own safety under similar circumstances or surroundings, and if injured, his injury would be attributable to his own negligence; and in either event he would not be authorized to recover." The charge is not subject to the criticism that it instructed the jury as to what facts would constitute negligence.
11. There was no error of which the plaintiff could complain in the following charge: "In a nutshell: If the mayor and council placed or had placed the obstruction in the street, and the obstruction was not such as a prudent municipality would have placed, under like circum-

stances or surroundings, and Dr. Holliday was injured by reason thereof, he can recover, provided he was in the exercise of ordinary care in discovering the obstruction and preventing his injuries, or that he could not have avoided the injury by the exercise of ordinary care on his part. If he was not in the exercise of such care, then he can not recover."

12. The following charge was free from substantial error: "I charge you, whatever the law required positively the defendant to do, a failure to do so is negligence, and in this case the law required the city to keep the streets in safe condition for travel in the ordinary modes, and if you are satisfied, from the evidence, that he failed to do so, then I charge you that the defendant was guilty of negligence; the law also required the plaintiff to exercise ordinary care in using the street, and if you are satisfied, from the evidence, that he failed to do so, then I charge you that the plaintiff was also guilty of negligence; therefore, if you are satisfied, from the evidence, that the defendant was negligent, and such negligence resulted in injury to the plaintiff, and you are also satisfied, from the evidence, that the plaintiff was also negligent at the same time, and his negligence concurred with the negligence of the defendant, and, concurring with the negligence of the defendant, contributed to this injury of the plaintiff, so that plaintiff's negligence would become a proximate cause of the injuries, and that the plaintiff would not have been injured if he had not been negligent, even though the defendant was also negligent, the plaintiff, under such circumstances, could not recover for his injuries."
13. The following instruction stated correctly the rule of law applicable to the theory of the case presented by the evidence for the defendant: "If, upon the other hand, the plaintiff, in driving his car along the street in question, by the exercise of ordinary care on his part could have discovered the existence of the obstruction in the street, and, failing to do so, ran his car into the obstruction and was injured, his injuries would be attributable to want of care, and he would not be authorized to recover; or if, in the exercise of ordinary care, he discovered the obstruction in the street, and, after making such discovery, he could have prevented the accident and injury to himself by the exercise of ordinary care for his own protection, and failed to do so, and was thereby injured, he could not recover for such injuries, and you should so find."
14. In view of the entire charge, the following instruction, while inaccurate, will not require the granting of a new trial: "Where a party puts a witness on the stand, he is bound by his testimony, unless he has been entrapped by the witness, and will not be allowed to impeach his testimony."
15. As applied to the facts of this case, the following charge will not be held to be erroneous: "I charge you further, as a rule of law, that when one, knowing of the dangerous obstructions in a street, voluntarily undertakes to use such street, when there is another street free from obstruction, he is guilty of such negligence on his part as will preclude his right to recover damages for injuries sustained while using such obstructed street."

DECIDED MARCH 6, 1912.

Action for damages; from city court of Athens—Judge West. September 11, 1911.

W. M. Smith, E. K. Lumpkin, for plaintiff.

F. C. Shackelford, for defendant.

POTTLE, J. 1-4. The plaintiff, Dr. Holliday, received certain injuries to his person by being thrown from an automobile which came in contact with a rope stretched across Hancock avenue, in the city of Athens. The rope had been placed across the street by the municipal authorities, for the purpose of closing the thoroughfare to travel while certain repairs on the street were in progress. The plaintiff predicates his right to recover damages upon a claim that the city was negligent, both in the character of obstruction used and in failing to give sufficient warning and take sufficient precautionary measures for his protection. The city denied that it was negligent at all. It averred that the rope was nearly two inches in diameter and such as was customarily used for the purpose; that it could have been seen by the plaintiff for 150 to 200 yards before he reached it; that the plaintiff was driving his automobile at a negligent rate of speed, in excess of that authorized by the city ordinance, and that the plaintiff was injured, not on account of any negligence of the defendant, but on account of his own negligence and failure to exercise ordinary care. It would not be profitable to discuss the evidence in detail. The jury settled the issues of fact in favor of the defendant. There was ample evidence to support this finding. The jury were warranted in finding that the plaintiff was guilty of negligence, both in reference to the speed at which he was driving his machine and in reference to his failure to observe ordinary care for his own protection. There is no new law involved in the case. The city, of course, had a right to close the street for travel while the repairs were under way. It was its duty to take such precautionary measures for the protection of the plaintiff and others having a right to use the street as ordinary prudence would dictate. Just what these precautions should have been and just what warnings should have been given, and what character of obstruction should have been adopted to close the street, were all questions of fact for the jury. The plaintiff was under a corresponding duty to exercise ordinary care for his own protection. Generally speaking, the question as to what acts he should have performed to avoid injury to himself were also

questions of fact for the jury. But it was certainly incumbent on the plaintiff, as a matter of law, to use his eyesight for the purpose of discovering any obstruction which might have been placed in the street. For instance, it would be gross negligence for a municipal corporation to leave exposed and unprotected a hole in one of its streets, but if one using the street deliberately and intentionally closed his eyes and failed to see such an obvious danger, when if he had looked he could have seen it, it would be said as a matter of law that he had failed to exercise ordinary care for his own protection. These principles are well settled by decisions of the Supreme Court. See *Mayor &c. of Savannah v. Waldner*, 49 Ga. 316; *Wilson v. Atlanta*, 63 Ga. 291; *Massey v. Columbus*, 75 Ga. 658; *Sheats v. Rome*, 92 Ga. 535 (17 S. E. 922); *City Council of Augusta v. Tharpe*, 113 Ga. 153 (38 S. E. 389); *Idlett v. Atlanta*, 123 Ga. 821 (51 S. E. 709).

5, 6. The plaintiff alleged that he was free from fault and that the defendant was negligent in failing to take proper precautions for his safety. The defendant pleaded that it had taken all of the precautions which ordinary care required, and that the plaintiff's injuries were the result of his own failure to exercise ordinary diligence. The plaintiff testified, that he did not know the rope was across the street; that the rope was of about the same color as the street, and for this reason he could not see it; that he was driving his machine at from five to six miles an hour; that he did not see the rope until he approached within ten or twelve feet of it, and that after he saw it he did everything to stop his machine before striking the rope. If these facts were to be believed, the plaintiff was free from fault. There was evidence for the defendant that the rope could have been easily seen by the plaintiff from 150 to 200 yards before he reached it, that it was a large rope such as was customarily used for the purpose of closing the street for repairs, and that the city was not negligent in reference to the matter of taking proper precautions for the plaintiff's protection. There was no specific plea averring that the plaintiff's injuries were due to an accident. After the jury had retired they were recalled and instructed that if they should find both the plaintiff and the defendant free from fault, he could not recover. It is contended that this instruction was erroneous because there was no plea of accidental injury, and it is urged that the charge was particularly

harmful because given disassociated from any other instructions and after the jury were recalled from their room. It is very clear that there was ample evidence to sustain a finding by the jury that neither the plaintiff nor the city was lacking in ordinary care. This being so, the theory of accident was involved in the case, and it was not error to give an instruction thereon. Inasmuch as there was no specific defense of accidental injury, the judge would not have been compelled to give an instruction upon this theory, certainly not in the absence of a written request, but he had a right to do so, and the fact that he recalled the jury, to give an additional instruction omitted from his general charge, will not be held to be prejudicial error.

7. During the trial a piece of rope was introduced in evidence by the city. One of its witnesses testified positively and unequivocally that he had cut this piece from the rope which was stretched across the street, and with which the plaintiff came in contact when he was injured. There was testimony in behalf of the plaintiff that the fragment of the rope introduced in evidence was cut from another rope, and that the one actually stretched across the street was smaller and of a darker color than was indicated by the piece introduced in evidence. One of the grounds of the motion for new trial is based upon the alleged newly discovered testimony of several witnesses corroborating the plaintiff's theory in reference to the piece of rope introduced in evidence on the trial. Opposed to the affidavits of this witness is an affidavit of the witness who had testified for the city, reiterating his statement that he had cut this piece of rope from the rope by which the plaintiff claimed he was injured. There were affidavits of two other witnesses for the city, tending to corroborate the affidavit of this witness. The alleged newly discovered evidence was manifestly cumulative and impeaching in its character, and for this reason was not cause for a new trial.

8-15. Complaint is made of numerous extracts from the judge's charge, which are set forth in the headnotes. The criticism of the charge contained in the 9th headnote is directed mainly at the use of the language in the concluding portion of the extract, to the effect that the plaintiff would not be allowed to recover if, "by taking proper precautions," he could have avoided the consequences of the defendant's alleged negligence. This was not an accurate

statement of the rule, but when the charge is considered all together, it is manifest that the court did not intend in this instruction, and the jury could not have understood him to intend, to hold the plaintiff to a higher degree of care than that of ordinary diligence. The language used by the trial judge was an exact quotation from *W. & A. R. Co. v. Ferguson*, 113 Ga. 713 (39 S. E. 306, 54 L. R. A. 802). Having instructed the jury that the plaintiff must take such steps as an ordinarily prudent person would have taken, it is manifest that the judge meant to say that the failure to use proper precautions would be equivalent to a failure to exercise ordinary diligence. It may be that the extract from the charge quoted in the 15th headnote stated the rule too broadly, but it was not erroneous when applied to the facts of the present case. Certainly, if the plaintiff knew the rope was stretched across the street, he had no right to drive his automobile into the rope at any rate of speed, and if he did so, he was guilty of such negligence as would preclude a recovery. Where a street is wholly and entirely obstructed to travel, one knowing of the presence of such an obstruction would not have a right to use the street, and would be guilty of negligence if he attempted to do so. In reference to the instruction set forth in the 8th, 10th, and 11th headnotes, the complaint is that the court should not have instructed the jury that it was necessary for the plaintiff to do any acts for his own protection, but should have left the jury to decide, first, whether or not the plaintiff should have done anything under the circumstances for his own protection, and, secondly, whether the things he did were such as would have been done by an ordinarily prudent person similarly situated. We think the court properly instructed the jury, as a matter of law, that it was necessary for the plaintiff to do everything that an ordinarily prudent person would have done, under the same circumstances, to protect himself from injury, and leave to their decision solely the question whether or not the plaintiff had done those things which ordinary diligence required him to do. The extract from the charge set forth in the 14th headnote contained an inaccurate expression. It is not a correct statement of the law to say that when a party puts a witness on the stand, he is bound by his testimony. The trial judge evidently did not intend his language to have the meaning which it seems to carry with it. Doubtless the judge intended simply to

state the general rule that a party can not impeach his own witness unless he has been entrapped by the witness. Of course, a party litigant has a right to offer a witness who will testify to a different state of facts from those disclosed by other witnesses offered by the same party. We have, however, carefully read the entire charge of the trial judge in this case. The rules of law applicable to the issues made by the pleadings and the evidence are, in the main, correctly stated in it, and afford the plaintiff no just cause of complaint. In view of the fact that the verdict was abundantly supported by the evidence, and taking into consideration the entire charge, which was eminently fair to both sides, it will not be held that this inaccurate verbiage in the extract referred to requires a reversal. We find no substantial error in the record, and the judgment overruling the motion for a new trial will be affirmed.

Judgment affirmed.

3808. CRONHEIM v. POSTAL TELEGRAPH-CABLE CO.

1. Where a check is indorsed to a bank "for collection and credit for deposit" to the account of the payee, the bank is the agent of the payee to collect, and title to the check does not pass to the bank, in the absence of an agreement to that effect, evidenced otherwise than by the language of the indorsement.
2. Such an agency may be revoked by the payee at any time before collection, and may be terminated by instructing the bank upon which the check is drawn to withhold payment.
3. Following the decision in *Schofield Manufacturing Co. v. Cochran*, 119 Ga. 901 (47 S. E. 208), where the owner of a check delivers it to a bank for collection, and, before the proceeds are remitted, the bank fails and is placed in the hands of a receiver, the owner is not entitled to priority over the general creditors of the bank.
4. The probability that the drawer of a check given in settlement of a debt will request the drawee to withhold payment, when instructed so to do by the payee, and that the drawee will comply with such request, is so legally certain as to support an action for damages against a telegraph company for failing to deliver a message from the payee to the drawer, containing such an instruction.
5. The petition set forth a cause of action, and should not have been dismissed on demurrer.

DECIDED MARCH 6, 1912.

Action for damages; from city court of Atlanta—Judge Reid.
September 19, 1911.

H. Cronheim brought suit against the telegraph company, making in his petition substantially the following allegations: Plaintiff was general superintendent of the insurance department of the supreme lodge of the Knights of Pythias for the State of Georgia, and had an office in the city of Atlanta, which was under the control of and maintained by the supreme lodge of the Knights of Pythias. On December 20, 1907, he received from Carlos S. Hardy, general secretary of the supreme lodge of the Knights of Pythias in the city of Chicago, Ill., a certain voucher-check, in the following words and figures, to wit:

"Supreme Lodge Knights of Pythias, Insurance Department.
Voucher-Check No. H 1533. Chicago, Ill., 12/18, 1907.

To H. Cronheim, Address, Atlanta, Ga.

\$1220.

This voucher-check is payable in current funds at the First National Bank of Chicago, when receipted in accordance with directions below.

Advanced on a/c.....No.....\$1220.00

Approved for payment: Carlos S. Hardy, General Secretary.

Countersigned: Sam'l O. Smart, Auditor.

Audit No. 1070.

Received at Atlanta, Ga., (Date) Dec. 20, 1907, twelve hundred twenty and no/100 dollars (\$1220.00), in full payment of the above account.

Account No. 5

Drawn W. O. P.

H. Cronheim.

Before signing please write place and date above.

Directions: This receipt must be dated and signed by the party in whose favor the voucher-check is drawn, and in exact form as given above.

(Endorsements on back of voucher-check.)

No. H. 1533.

Supreme Lodge Knights of Pythias. Insurance Department.
Date 12/18-07. \$1220.00

Payable at The First National Bank, Chicago, Ill. No protest.
The Neal Bank, Atlanta, Ga.

Paid through Chicago Clearing-house 2-3 Dec. 23, '07, to Central Trust Company of Illinois.

Pay to any bank or bankers, or order. All other endorsements guaranteed. Dec. 20-07. The Neal Bank."

On December 20, 1907, the plaintiff deposited the voucher-check in the office of the Neal Bank in the city of Atlanta, "for collection." In the usual and ordinary channels the check proceeded from the office of the Neal Bank to the Central Trust Company of Illinois, in Chicago, for presentation to the First National Bank of Chicago for payment. On December 21, 1907, which was Saturday, the Neal Bank failed and closed its doors for business. On December 23, at 7.55 a. m., the plaintiff filed with the defendant company in Atlanta a telegram of which the following is a copy: "Atlanta, Ga., December 23, '07, to Carlos S. Hardy, 1220 Manhattan Building, Chicago, Ill. Stop payment check twelve hundred twenty-two dollars sent Dec. statement have written. [Signed] H. Cronheim." It is alleged that this telegram referred to the voucher-check hereinbefore mentioned, and was designed to cause the addressee to instruct the First National Bank of Chicago to refuse payment of the check when presented, on account of the failure of the Neal Bank. At the time this message was left with the defendant's agent in Atlanta, attention was urged by the plaintiff to its importance, and to the consequences that would be suffered by him in the event of a failure to transmit it promptly, and the agent informed petitioner that it would reach its destination in about thirty minutes. The check in question was presented to the First National Bank at Chicago by the Central Trust Company of Illinois at 12 o'clock, noon, December 23, 1907, and was paid through the clearing-house of Chicago, the check having been indorsed by the Neal Bank to the Central Trust Company. The telegram was not delivered to Carlos S. Hardy until 2.05 p. m., December 23, 1907, having been negligently delayed in delivery by the defendant. Carlos S. Hardy, the general secretary, was in his office at the address referred to in the telegram, during the whole of December 23, 1907, and "would have stopped payment of this said voucher-check by the First National Bank of Chicago if he had received said petitioner's message at any time prior to the receipt of the same, to wit, December 23, 1907." It was further alleged that there was an error in transmission of the message, both as to the name of Carlos S. Hardy and as to the place for delivery of the message, as well as in the name of the sender, and it is

averred that these errors in transmission contributed to the delay in delivery. Plaintiff was individually responsible to the supreme lodge of the Knights of Pythias for the safe-keeping and distribution of all funds placed in his hands by the supreme lodge. He was responsible for the collection, safe-keeping, and proper distribution of the check, and no loss ensued to the supreme lodge by reason of the placing of the check in the Neal Bank for collection and the failure of the defendant to promptly deliver the telegram, but the loss, as heretofore set forth, was sustained by the plaintiff individually. The Neal Bank having become insolvent, the check passed into the hands of the receivers of the bank, and, on account of the gross negligence in failing to deliver the message, the proceeds of the check were paid to the order of the Neal Bank, when, by ordinarily prompt and careful transmission and delivery of the message, payment could have been legally prevented; and plaintiff was forced to make the check good to the supreme lodge of the Knights of Pythias. Plaintiff has received from the receivers of the Neal Bank three payments on the check, as follows: March 20, 1908, \$244; October 20, 1908, \$244; November 20, 1909, \$183, making a total of \$671. He sues for the difference between this sum and the amount of the voucher, plus interest, claiming the right to recover the sum of \$862.32. On January 23, 1908, within sixty days from the date of the injury and damage complained of, the plaintiff filed his claim against the defendant for the sum of \$1,220, alleging the same to be due him as damages for the negligent transmission and delivery of his message, and caused said claim to be referred to the agency of the defendant in the city of Atlanta, the agency which had received the message for transmission and delivery, and the defendant refused to pay the amount claimed, or any part thereof.

The defendant interposed a demurrer to the petition, upon the following grounds: (1) because no cause of action is set forth; (2) because it does not appear how the plaintiff became legally liable to the supreme lodge of the Knights of Pythias for the proceeds of the voucher; (3) because it appears that the plaintiff had a preferential claim against the receivers of the Neal Bank, and that sufficient funds went into the hands of the receivers to pay his claim in full; (4) because it appears from the petition that the right of action is not in the plaintiff. The defendant specially demurred to the averment that the plaintiff was general superintendent of

the insurance department of the supreme lodge of the Knights of Pythias, and had an office in the city of Atlanta, which was maintained and controlled by the supreme lodge, and also to the allegation that the telegram had been negligently held by the defendant and not delivered to the addressee until 2.05 o'clock p. m., upon the ground that these allegations were impertinent. The defendant demurred also on the ground that the allegations of the petition did not show how and in what manner the plaintiff became legally responsible for the proceeds of the collection of the check; the averment in reference to this matter being alleged to be vague, indefinite, and uncertain. Special demurrer also raised the point that the nature, character, and details of the claim alleged to have been filed with the defendant were not set forth.

In response to the demurrer the plaintiff amended his petition as follows: The check described in the petition was issued to the plaintiff "as an advance on account of the current expenses of his office" as general superintendent of the insurance department of the supreme lodge, and was issued for the purpose of paying "various commissions and compensations due to him and to various and divers secretaries of local branches of the insurance department of the supreme lodge Knights of Pythias in the State of Georgia, under his employment and supervision, for soliciting applications from members of the order of Knights of Pythias for insurance in said department, said voucher-check having been so remitted and entrusted to him in his individual name and capacity by said insurance department, supreme lodge Knights of Pythias, for the purposes aforesaid." Plaintiff sustained individual loss by reason of the negligence of the defendant, both on account of being a trustee and distributor of the voucher-check for the purpose above mentioned, and because of his ownership thereof, by reason of which he was compelled to make the same good to the insurance department of the lodge. The original petition alleged that the voucher-check was deposited in the Neal Bank for collection. By amendment it was alleged that the check was deposited "for collection and credit to his individual account with said Neal Bank for deposit."

The trial judge passed the following order: "The amendment makes it appear that the check was deposited for credit to the plaintiff's private account subject to his check, and it thus became

the property of the bank, and he had no right to stop its payment. He sues only for actual damages. The general demurrer is sustained and the plaintiff's petition dismissed, with judgment against the plaintiff for" costs. The plaintiff excepted.

Leon C. Greer, for plaintiff.

Anderson, Felder, Rountree & Wilson, for defendant.

POTTLE, J. (After stating the foregoing facts.)

1, 2. When the receipt was signed by the plaintiff the voucher became an order on the Chicago bank for the sum expressed in its face. The voucher recited upon its face that it was payable in current funds of the bank when the receipt was signed. When the receipt was signed the voucher had all of the incidents of a check drawn in the usual form upon the order of the payee and indorsed by him. It was the right of the payee to divest himself of the title to the voucher by an absolute sale, or he could appoint an agent to collect and remit to him the proceeds. Ordinarily banks do not buy the checks of their customers drawn on other banks, but there is no legal objection to their doing so. Generally checks or drafts of this kind are accepted only for collection. The customer may be credited with the paper, or he may be credited with the amount of the check as cash (*Bailie v. Augusta Savings Bank*, 95 Ga. 277, 21 S. E. 717, 51 Am. St. R. 74); but even in the latter case it is well settled that the bank does not forfeit the right to charge the amount back to the customer if the check is dishonored. 1 Morse, Banks and Banking (4th ed.), § 187. Sometimes, as a matter of accommodation to customers, banks do credit as cash the amount of foreign checks and permit the depositor to draw immediately against the credit; but this is a mere matter of custom or practice, which can of course be departed from at any time and in any case. Generally title to a particular check deposited in a bank does not pass out of the depositor until the proceeds are collected. The question, like all other questions of contract, depends upon the intention of the parties. If they intend title to pass, and by apt words enter into an agreement to this effect, such a contract will be given legal efficacy. But the courts will rather presume that simply the relation of principal and agent was created, in the absence of clear evidence that the parties intended that the relation of debtor and creditor should arise immediately upon the deposit of the check. Where a draft or check

is deposited "for collection," it is clear that the title does not pass. *Central Railroad v. First National Bank*, 73 Ga. 383; *Neal v. Gray*, 124 Ga. 511 (3), (52 S. E. 622). Where it is deposited generally, upon an indorsement in blank, and nothing more appears, it will be presumed that the deposit was made in the usual course of business, and that the depositor intended to appoint the bank as his agent to collect the proceeds and deposit them to his credit. Here the voucher was left "for collection and credit to his individual account with said Neal Bank for deposit." There is no averment of any agreement or understanding other than that which may be implied from this language. There is no allegation that at the time the voucher was left with the bank the plaintiff was credited with the amount of it as cash, or that there was any agreement that he was to be allowed to draw against the voucher, or any previous course of dealing by which he had the right to do this, or that he actually did so. We are, therefore, confined to the language of the averment above quoted, to ascertain the intention of the parties. So dealing with the case, we are very clear that title did not pass from the plaintiff. The evident meaning of the averment is that the plaintiff appointed the bank his agent to collect, and that *when collected* the proceeds should be deposited to his individual credit. This being so, the plaintiff had the right to control the check and stop its payment. The agency was revocable and could be terminated at the plaintiff's pleasure. Indeed, the insolvency of the bank before the collection was actually made terminated the agency and the bank's right to proceed. 5 Cyc. 512. But unless terminated, the agency continues until the collection is made, after which the relation of debtor and creditor arises. In *Freeman v. Exchange Bank*, 87 Ga. 45 (13 S. E. 160), a check was indorsed "for deposit to the credit of" the indorser. It was held that the proceeds of the check in the hands of a disinterested bank through whose agency the collection was made were subject to garnishment as assets of the indorser. We quote from the opinion of Mr. Chief Justice Bleckley: "There being in evidence no facts extrinsic to the bill itself and its indorsements to throw light upon the question of title, we are not to be understood as holding that such facts might not exert a controlling influence on the question. Indeed, there is authority for giving them such effect when duly proved. A deposit of paper in bank by a customer, he indorsing it 'For deposit,'

may operate to clothe the bank with title under certain circumstances. *National Commercial Bank v. Miller*, 77 Ala. 168; 2 Morse on Bank. § 577. But the general rule is, that by a restrictive indorsement the depositor retains the title. Bolles on Banks and Depositors, § 220." In *Fourth National Bank v. Mayer*, 89 Ga. 108 (14 S. E. 891), it was held: "Where a regular customer of a bank deposits with the bank his draft payable to his own order and indorsed, 'For deposit to the credit of' the drawer, and the same is entered to his credit on the books of the bank and forwarded by the bank to another bank for collection, the drawer, by the course of dealing, having the right to check against such deposit and in fact checking against it, and his checks being honored, the title to the draft passes to the first bank, and when collected by the second, the proceeds are not subject to garnishment at the instance of a creditor of the drawer, such proceeds being the property, not of the drawer but of the first bank. The case is distinguishable from *C. R. R. v. First Nat. Bank*, 73 Ga. 383, and *Freeman v. Exchange Bank*, 87 Ga. 45 [13 S. E. 160]." We are of the opinion that the judgment of dismissal can not be sustained upon the ground upon which it was placed by the learned trial judge.

3. It is contended that the demurrer was rightly sustained because, under the facts alleged, the plaintiff was a preferred creditor of the Neal Bank, and could have avoided any loss by following the fund in the hands of the receiver; that the proceeds of the voucher which came into the hands of the receiver was a trust fund, and that a court of equity would have awarded it to him as such. We need not consider whether a wrong-doer, like the defendant is admitted by the demurrer to be, can raise such a question. There is force in the suggestion that one who has wrongfully occasioned another damage ought not to be heard to say, after the damage is done, that the injured party should have sought relief in another proceeding and against another party. Whether the general rule that an injured party is bound to lessen his damage would make permissible a defense of this nature we need not inquire. In the celebrated English case of *Knatchbull v. Hallett*, 13 Ch. D. 696, the old equity rule that either the property misappropriated by a faithless agent or its proceeds must be capable of identification, before equity would impress it with a trust in favor of the party wronged, was enlarged and extended so as to apply to a case where money held by a person

in a fiduciary character was paid by him to his account at his banker's; it being held that in such a case the owner of the money could follow it and have a charge on the balance in the banker's hands. This modern doctrine has been followed by some of the American courts and applied to a fund collected by an insolvent bank as agent for another. See 5 Cyc. 512; 3 Am. & Eng. Enc. Law (2d ed.), 805; 2 Morse, Banks & Banking (4th ed.), § 590; *State v. Edwards*, 61 Neb. 181 (85 N. W. 43, 52 L. R. A. 858). But the rule is settled otherwise for us by the Supreme Court. In *Tiedeman v. Fertilizer Co.*, 109 Ga. 661 (34 S. E. 999), it was held: "Where the owner of notes placed the same in the hands of another for collection, and the bailee, having made collections, failed to remit the proceeds, the claim of the owner of the money collected was, in a general sense, in the nature of a fiduciary debt, but not such an one as entitled him to a priority over the claims of general creditors in the distribution of the assets of the bailee who had become insolvent." *Ober v. Cochran*, 118 Ga. 396 (45 S. E. 382, 98 Am. St. R. 118), is to the same effect. But it is said that the rule announced in these cases should not be applied where the bank became insolvent before the collection was made and the fund was paid over to the bank's receiver. In such a case it is urged that the fund is an asset of the depositor in the custody of the court, the depositor never having become a creditor of the bank, and the agency to collect having been terminated by the insolvency of the bank; that the receiver has no right to mingle the fund with the general assets of the insolvent bank, but should hold it as a trust fund to be paid over to the depositor upon demand. There is much in this argument to commend it. The particular fund is in gremio legis, and collected by the receiver as a special fund, in consummation of the agency of the bank, which has been terminated by its insolvency. The receiver is not bound to accept the fund; and if he does so, it would seem to be equitable and right for him to pay it over intact to the person who employed the bank to make the collection. But in *Schofield Manufacturing Co. v. Cochran*, 119 Ga. 901 (47 S. E. 208), the bank failed and was placed in the hands of a receiver before the money was returned, and it was held that the owner of the draft which was thus collected was not entitled to priority over general creditors. This

decision settles this question adversely to the contention of the defendant in error.

4. It is contended that the judgment dismissing the petition should be affirmed because the plaintiff's claim for damages is dependent upon a speculative or contingent event, which is not so legally certain as to authorize a recovery against the defendant. In other words, it is said that the allegation in the petition that the addressee, Carlos S. Hardy, would have stopped payment of the check had the message been promptly delivered is an averment as to the happening of an event uncertain and speculative. The rule applicable in such cases is thus stated in the *Cyclopedia of Law and Procedure*, vol. 37, p. 1758: "The loss is not, in the eye of the law, the proximate consequence of the telegraph company's negligence in a case where, even if the company had performed its duty, there can be no legal certainty that the loss would not still have occurred or the object of the message have been defeated. Thus, if the happening or preventing of the loss, even though the telegraph company had performed its duty, would still have been dependent on a speculative or contingent future event, or on the voluntary action or inaction of the other party to the message, or of plaintiff himself, or of a third party, where there was no obligation on the part of such party to act or not to act, it can not be said with legal certainty that the loss was the result of the telegraph company's negligence." This rule has been applied in a great variety of cases. For instance, where a suit was brought against a telegraph company for damages on account of the failure of the plaintiff to complete a contract referred to in the message, it was said that before the plaintiff could recover it must be said "with legal certainty that if that telegram had been delivered, there would have been an actual contract; for if a contract had not ensued, the company would clearly not be liable. We everywhere come across the rule that damages must not be contingent and conjectural. I do not here mean a conjectural process of fixing the mere amount of damages; but I mean that we can not fix damages upon a party as guilty of wrong upon a cause or basis resting on a contingency, upon an event that might, or might not, have happened. We can not say that the proposal of the lumber company would have been accepted." *Beatty v. Telegraph Co.*, 52 W. Va. 414 (44 S. E. 311). To the same effect, see *Tanning Co. v. Telegraph Co.*, 143 N. C. 376

(55 S. E. 777). The rule was applied in favor of the telegraph company in a case where it was sued for damages for failing to deliver a message to a witness summoned to testify in a pending action. It was held that the claim of the plaintiff that, if the witness had been present, he would have won his case was too speculative to be the basis of damages. *Martin v. Telegraph Co.*, 18 Wash. 260 (51 Pac. 376). Claim for damages was also denied in a case where the company failed to deliver a message to a son, announcing the illness of his father, the claim being predicated upon the theory that if the message had been delivered, the son would have reached his father's bedside before his death and would have received from him a donation. The court held that such a loss as claimed by the plaintiff could not have been contemplated when the message was delivered. *Chapman v. Telegraph Co.*, 90 Ky. 265 (13 S. W. 880). In *Western Union v. Crall*, 39 Kan. 580 (18 Pac. 719), it was held that damages could not be recovered on account of loss of anticipated gain based upon the probability of the plaintiff's horse being able to win prize purses at a trotting race. In *Walser v. Telegraph Co.*, 114 N. C. 440 (19 S. E. 366), it appeared that the comptroller of the currency sent a telegram to the plaintiff, inquiring if he would accept the receivership of a certain bank at a compensation mentioned in the telegram. It was held that the plaintiff could not recover damages for the non-delivery of the message, inasmuch as, even if he had accepted the offer, the government was under no legal obligation to appoint him, and that for this reason the damages were too remote and rested upon an event too uncertain. So in a case where a telegram was sent requesting the shipment by express of four gallons of whisky, the plaintiff was not allowed to recover, because there was no evidence that the whisky would have been sent if the error in the transmission of the message had not been made. *Newsome v. Telegraph Co.*, 137 N. C. 513 (50 S. E. 279). See also *Smith v. Telegraph Co.*, 83 Ky. 104 (4 Am. St. R. 126); *McColl v. Telegraph Co.*, 44 New York Superior Ct. 487. In *Clay v. Western Union Telegraph Co.*, 81 Ga. 285 (6 S. E. 813, 12 Am. St. R. 316), the plaintiff alleged that, by the negligence of the company, a telegram sent to him was not delivered in time for him to make a trade, whereby he lost a certain sum which he would have made as profits if he had received the telegram at the proper time. The plaintiff was an undertaker, and the telegram was a

direction for him to meet a certain train, to arrange for the shipment of the remains of the person named in the telegram. The court held that by the failure of the company to deliver the message the plaintiff lost a mere opportunity or possibility to make something, and the judgment dismissing the petition on general demurrer was sustained. See, also, *Western Union Telegraph Co. v. Watson*, 94 Ga. 202 (21 S. E. 457, 47 Am. St. R. 151); *Bashinsky v. Western Union Telegraph Co.*, 1 Ga. App. 761 (58 S. E. 91). In the case last referred to, the plaintiffs alleged that by the failure of the defendant to deliver a message they lost a contract under which they would have made certain commissions. Judge Russell, speaking for the court, said: "It can not be seen, from the allegations of the petition, how the plaintiffs were damaged. No right to recover damages is alleged. It is nowhere distinctly alleged that the plaintiffs had a contract with the sender of the message. On the contrary, from the distinct averment in the fourth paragraph of the petition, that they 'would have been able to have made the contract,' etc., it can only be inferred that they did not have such a contract as would have bound the sender of the message. They lost nothing but a chance to make something. It was a case of lost opportunity, but the plaintiffs were in the same condition after receiving the telegram as they were before, except the expense of their reply, which was sent 'at a venture.' It is averred that if the plaintiffs had received the telegram in time, they would have made \$1,999.99. They might have done this if they had been able to make the contract, or they might not. No contract is set out." See also *Richmond Mills v. Western Union Telegraph Co.*, 123 Ga. 216 (51 S. E. 290), where the telegram which the defendant failed to deliver contained a mere proposal to sell goods. It was held that the claim of the plaintiff, that if the message had been delivered, the purchaser would have accepted and they would have made certain profits, rested upon an event too uncertain to authorize a recovery. In *Capers v. Western Union Telegraph Co.*, 71 S. C. 29 (50 S. E. 537), the right to recover damages for the failure of the defendant to deliver a message in time to have money deposited in a bank to pay a check was denied upon the ground that the plaintiff failed to allege "that the addressee would have delivered the money in time to the person designated to convey it to the bank, and that such person would have conveyed it in time."

We recognize the soundness of these decisions and the correctness of the general rule therein announced, but we do not think this rule is applicable to the facts of the present case. If one owes another money, it is his duty to seek him out and pay him in legal tender. If the creditor, for the mere accommodation of the debtor, accepts the latter's personal check drawn upon a foreign bank, the creditor has the right to appoint an agent to collect this check. The delivery of the check to the creditor does not satisfy the debt, unless expressly so accepted. The obligation of the debtor continues until the check is actually paid. The creditor has a right to revoke the agency to collect, and, if he appoints a faithless agent and undertakes to revoke the agency, it is the duty of the debtor to co-operate with the creditor in the revocation of the agency; and if the debtor received from the creditor a telegram requesting him to stop payment of the check, and he should fail to do so, and the money should be misappropriated by the agent appointed to collect, the debt would not be satisfied and the debtor would still be liable to the creditor. This being true, the debtor would be under a legal obligation to stop payment of the check. The court will not assume, as a matter of law, in such a case, that the debtor would not comply with this obligation imposed upon him, but, on the contrary, will presume that he would have done what the law would require him to do in order to relieve himself from liability. The allegation in the petition is that the person to whom the message was addressed would have stopped payment of the check. If this person had been under no obligation to stop payment, but a mere outsider, the plaintiff would have stated no cause of action; because in that case the person to whom the message was sent might or might not have complied with the request, would have been under no obligation to do so, and the court would not presume that he would have done so. The possibility of his complying with the request in such a case would have been too uncertain and contingent to form the basis of a recovery. But we think the case is altogether different where the person to whom the message is sent is the one who drew the check and who owed the money, and who was, therefore, under a legal obligation to take the necessary steps to save himself from loss. See generally, on this subject, *Western Union Telegraph Co. v. Ford*, 8 Ga. App. 514 (70 S. E. 65), s. c. ante, 606 (74 S. E. 70).

5. But it is contended that Hardy, the person to whom the tele-

gram was addressed, was not such a debtor of the plaintiff as to place him under any legal obligation to comply with the request contained in the telegram. Under the allegations of the petition, the amount of money named in the voucher was due to the plaintiff, to be used by him for the purpose mentioned in the petition. Hardy was the custodian of the fund out of which this money was to be paid. He had a right to withdraw the fund by check. It was his duty as an agent of the supreme lodge of the Knights of Pythias, and as custodian of the fund, to pay over this amount of money to the plaintiff. Now, suppose the message had been promptly delivered to Hardy and he had negligently failed to notify the Chicago bank to withhold payment of the check. Is it not clear that Hardy would have been personally responsible for the loss of this money? A corporation acts only through its agents, and if one of its agents, by negligent inaction, causes the corporation to sustain a loss, the agent would be liable to the corporation. It is also true that if this agent, by his negligence, causes third persons to sustain loss, the agent would be individually responsible to the party injured. We think, therefore, that under the allegations of the petition the case stands just as though it were a transaction between an ordinary creditor and an ordinary debtor.

The fact that the telegram was addressed to Hardy as an individual makes no difference. It is said that as an individual Hardy had no right to stop payment on the check, but could have done so acting only in his capacity as an officer of the supreme lodge of the Knights of Pythias. We think it is entirely immaterial that the message was not addressed to him in his official capacity. Hardy as an officer and Hardy as an individual were one and the same man. If he had received the telegram as an individual, in all probability he would have taken whatever action was necessary and proper as an officer of the lodge to stop payment of the check. If the plaintiff had met Hardy on the street and requested him to stop payment of the check, it certainly would not have been necessary to address him expressly as general secretary of the supreme lodge of the Knights of Pythias, nor was it necessary to incorporate his official title in the telegram.

It is further contended that if there is any right of action at all, it is in the supreme lodge of the Knights of Pythias, and not in the plaintiff; that it appears from the allegations of the peti-

tion that the money belonged to the Knights of Pythias, and not to the plaintiff, and that he was the mere agent of the lodge to disburse the fund. The petition alleges, that the plaintiff was individually responsible to the supreme lodge of the Knights of Pythias for the safe-keeping and proper distribution of the voucher-check deposited with the Neal Bank; that no loss ensued to the supreme lodge by reason of the failure of the plaintiff to receive the proceeds of the check, and that the plaintiff alone was responsible for its loss, and that he had in fact made the same good to the supreme lodge. We think these allegations were sufficient to show that the plaintiff was authorized to bring suit in his own name. He avers, that he was responsible to the supreme lodge for the safe-keeping of the money; that the loss was occasioned by the act of the agent whom he appointed to collect the money, and that, recognizing his liability, he in fact paid to the supreme lodge the amount of the check. Under these allegations the plaintiff had a right to maintain the action. Our conclusion is that the demurrer was not well taken, and that the court erred in dismissing the petition.

Judgment reversed.

3810. COOPER v. BROWN, Governor.

1. When the principal in a criminal recognizance, conditioned for his appearance to answer a specific criminal charge therein designated, is thereafter arrested for an entirely distinct offense, and, being found guilty of the latter offense, is delivered into the custody of the State, to serve a term upon the public works in accordance with the sentence of a court of competent jurisdiction of this State, the sureties on the bond are released. The release of the sureties from future liability arises from their inability to produce their principal to answer the charge, caused by the act of the State in assuming a custody of their principal to which they were theretofore entitled.
2. The case is not affected by the fact that the principal in the appearance bond escaped from the chain-gang after he had entered upon the service of his sentence. When the State took him into custody to serve the sentence of the court, the obligation of the sureties was annulled, and no act of the principal or of the sureties could revive it.

DECIDED MARCH 6, 1912.

Forfeiture of recognizance: from city court of Houston county—
Judge Brunson. October 20, 1911.

R. N. Holtzclaw, for plaintiff in error.

R. E. Brown, solicitor, contra.

RUSSELL, J. The single question presented by this record is whether a judgment absolute upon a criminal recognizance can properly be entered against the plaintiff in error, who signed it as security. As appears from the record and from the agreed statement of facts, Cooper signed an appearance bond as surety of Peter Searcy, conditioned for the appearance of the said Searcy to answer an indictment for a misdemeanor. The indictment and the bond were transferred to the city court of Houston county, and thereafter, the principal failing to appear, a rule nisi was granted and scire facias issued thereon on May 18, 1911. On June 13, 1911, Searcy, the principal, was arrested by the sheriff of Dooly county, and was confined in the common jail of Dooly county until June 15, when he pleaded guilty to a misdemeanor in the city court of Vienna, and was sentenced to pay a fine of \$75 and costs, or, in default thereof, to serve twelve months on the chain-gang of Dooly county. On June 15, 1911, Searcy was delivered to the warden in charge of the chain-gang of Dooly county, and was in the chain-gang until July 5, 1911, when he escaped, and he has not been retaken. The warrant under which Searcy was arrested on June 13, 1911, was for a misdemeanor—cheating and swindling—committed in Dooly county, Georgia. The sheriff of Dooly county had knowledge that Searcy was wanted in Houston county, to answer to the indictment for misdemeanor, before he was arrested under the warrant for cheating and swindling in Dooly county. Upon this statement of facts the judge of the city court of Houston county entered a judgment absolute against Cooper, as surety, upon the recognizance; and error is assigned upon the rendition of this judgment.

The ruling in *West v. Colquitt*, 71 Ga. 559, is cited by counsel for both parties in this case. In that case it was held, that "Where one has been arrested and given bond to answer for a criminal offense, the sureties on such recognizance are not discharged by the subsequent arrest of their principal on another charge, and the giving of a bond, with other sureties, to answer therefor. If the State should keep him in continued custody, so as to render his production easy for it, but impossible for the sureties, they would be relieved, but the mere temporary restraint prior to the giving of the

second bond would not work a discharge." Really the precise question then presented to the Supreme Court, as stated by Chief Justice Jackson, was whether, after sureties had obligated themselves to produce the defendant to answer for an offense, they were discharged by a second arrest, for a different offense, and the giving of bail thereon. As to this the court held that the facts would not entitle the sureties on the first bond to be discharged. In reasoning on the fundamental provisions of the constitution of the United States and the constitution of this State, by which the right to give bail was granted to every citizen, the learned Chief Justice discusses the question at some length, and says, that "When the bail agree to produce their principal at court, they do so in full view of the fact that the principal may commit another offense, and may give bail for that, under another arrest; and that, because they have agreed to produce his body to answer for the first offense, the State does not bargain with them not to arrest him if he sins again, and then, that her highest law guarantees to him the right to give other bail to answer that. The State does an act perfectly lawful, when she so arrests him for a second offense." This really concludes the ruling upon the point actually before the court. What immediately follows is an opinion as to the law under a supposable case not then before the court, and therefore, in strictness, is mere obiter. However, the reasoning seems to us so unanswerable that, in the light of what is said by the Supreme Court in *Buffington v. Smith*, 58 Ga. 341, and *Hartley v. Colquitt*, 72 Ga. 352, we shall adopt the view of the learned Chief Justice upon the point which is now squarely presented to us. Treating of such a state of facts as those now before us, Chief Justice Jackson says: "If she [the State] should keep him [the principal] in her own custody, of course the bail in the first case would be discharged; because she could produce him, but they could not; and it would be against all reason to punish the sureties for what she did, and by so doing prevent them from keeping their bargain with her, and when all reason for the bail ceased, because she had the man in her own jail or her own penitentiary."

As ruled by the Supreme Court in *Smith v. Kitchens*, 51 Ga. 159, Cooper, the security in the recognizance now before us can not be charged with the escape of Searcy from the chain-gang of Dooly county. While the defendant is out on bond, he is, in contemplation of law, in the custody of his bail. *Hartley v. Colquitt*, 72 Ga.

352. When the bail signed the bail bond the law placed the principal in his custody. He could have arrested him and delivered him to the sheriff at any time. *Clark v. Gordon*, 82 Ga. 613 (12 S. E. 648) As Searcy, the principal, did not appear in conformity with his obligation, the rule nisi and scire facias thereupon properly issued, and if no action on the part of the State had intervened, and the principal failed to appear at the next term of the court, a judgment absolute would have followed necessarily. In *Dennard v. State*, 2 Ga. 137, as well as in *Roberts v. Gordon*, 86 Ga. 386 (12 S. E. 649), the court was dealing in each instance with a bond which required the defendant to answer the same charge for which he was sentenced; and in that respect these cases differ from the case at bar, in which the bond which is sought to be finally forfeited has no connection with the offense for which the principal in the bond was sentenced; but in our opinion the principle which controlled the rulings in the *Dennard* and *Roberts* cases, *supra*, must be applied in the instant case; for the reason that Searcy, Cooper's principal, was taken as completely from his control and custody, and placed as completely within the power of the State of Georgia, when the sheriff of Dooly county, and later the warden of the chain-gang, became his custodian, as if he had been placed in the custody of the sheriff of Houston county by Cooper's surrendering him, or by an order from the court, requiring him to be rearrested. In *Roberts v. Gordon*, *supra*, Chief Justice Bleckley says: "There can be no doubt that as soon as the sentence was pronounced, the sheriff, and not the bail, was the proper custodian of the convict. The legal effect of the sentence was equivalent to a special order directing the sheriff to hold him in custody. This being so, it was not necessary to enter an exoneretur on the minutes of the court in order to discharge the bail. The sentence itself operated as an exoneretur. *The Governor v. Kemp*, 12 Ga. 466." In *Smith v. Kitchens*, *supra*, where it was held that the lower court was right in discharging the securities in a case in which the principal on a prior appearance bond taken by a justice of the peace was arrested under a bench warrant, and remained in the custody of the sheriff until he escaped during the trial, Judge McCay, after saying it would be a very bad public policy to treat the bond given by the defendant before a magistrate as inhibiting the judge of the superior court, even after or before indictment, from order-

ing the rearrest of the defendant, uses the following language: "Here, after indictment found, the judge issues a bench warrant over his own signature and seal, ordering an arrest. That arrest was made, the party was in the custody of the sheriff, and escaped. It would, as it seems to us, be an outrage to charge the original securities with this escape. He was in the lawful custody of the sheriff. The securities could not control him."

The facts in the present case are not identical with those in *West v. Colquitt*, supra, but they are very similar to those in *Bufington v. Smith*, 58 Ga. 342, with the single exception that in *Bufington's* case Earle, his principal, had not escaped. In that case Judge Jackson said: "We think that the court erred. The State had Earle in her own custody—in the penitentiary—just as securely confined as if she held him in jail in Hart county. She had, and now has, nothing to do but to bring him out and try him whenever she pleases to do so. If found guilty, she can sentence him for another term, to begin when this White county sentence expires. It would be strange indeed if she forfeited a bond for his not appearing, when she had him in the jail in Hart county; and the penitentiary is her great jail, convenient to Hart as to all the rest of the State." After Searcy's sentence he was in the custody of the State, in a chain-gang under the control of the State. As said by Judge Jackson, the State could have brought him out any day and tried him for the Houston county case. The act of the State in resuming custody of the principal, though perfectly lawful, (to use the language of Chief Justice Jackson) put it out of the power of Cooper to maintain custody of Searcy, or to arrest him for the purpose of delivering him to the sheriff of Houston county in order to relieve his bail. When the State took the custody of Searcy as a convict, she assumed the risk of Searcy's escape. Nothing in the record places upon Cooper any responsibility for the escape, and as to that point the case is similar to the case of *Smith v. Kitchens*, supra. But, regardless of the escape, and even if Cooper had been implicated in it, while in that event he would have been subject to indictment, the obligation of the bond ceased and became *functus officio* when Searcy, Cooper's principal, entered upon his service in the chain-gang. Cooper's liability, except as to the costs of the forfeiture, ceased. No act of the principal or of the surety thereafter could revive the bond. The case would have been different if, as

in the *West* and *Hartley* cases, Searcy had given bond and paid his fine in the Dooly county case.

The judge erred in making the judgment upon the bond absolute.

Judgment reversed.

3811. WOOD & BROTHER v. JONES & SON.

1. Where a cotton factor makes with his principal an express contract to hold the cotton until instructed by his principal to sell, if the factor sells in the absence of instructions from the principal, the latter may recover whatever damages he has sustained. The measure of the damages would be the difference between the price for which the cotton was sold and the highest proved market value of the cotton, at the place where it was sold, at any time between the date of the sale and the date of the trial. If, in such a case, the factor sues the principal for advances previously made upon the cotton, the principal may recoup whatever damages he has sustained by reason of the breach of the contract by the factor.
2. There was no error of law committed, and the verdict was fully warranted by the evidence.

Complaint; from city court of Statesboro—Judge J. Hartridge Smith presiding. October 5, 1911.

The suit was upon a promissory note dated September 12, 1906, and due January 12, 1907, payment of which was secured by a deed to land. Contemporaneously with the note and the deed the defendants executed a writing in which they agreed that in consideration of advances aggregating the principal of the note sued on, they would deliver to the plaintiffs, for sale for account of the defendants, one bale of upland cotton for every ten dollars which had been or might be advanced. This instrument was not signed by the plaintiffs. The writing further provided: "All cotton I deliver for sale or remittances I may make to J. S. Wood & Bro. shall at their option be applied, first to the credit of any open account I may owe them and to the payment of damages aforesaid, up to the time of a final settlement; and that the above note or notes shall remain in full force, until such settlement." The defendants filed an answer setting up that the note was given to secure the plaintiffs for advances made to the defendants upon 45 bales of upland and 48 bales of sea-island cotton which had been shipped to the plaintiffs as factors, to be sold by them for the defendants' account; that when

the note was executed, the plaintiffs agreed to hold the cotton "until the same was ordered sold by the defendants;" that in violation of this agreement the plaintiffs sold the cotton at reduced prices, to the damage of the defendants in a named sum; that if the sea-island cotton had been held and sold on December 12, 1906, it would have been worth 34½ cents per pound, and if the upland cotton had been held and sold "about the 2d day of December, 1906," it would have been worth 11½ cents per pound. The answer avers that the cotton was actually sold by the plaintiffs without any instructions so to do from the defendants, on a date prior to the dates above mentioned and for a less price than it was worth on those dates. The defendants base their right to recoupment upon the facts just recited. A demurrer to the answer was overruled, and the defendants prevailed at the trial. The plaintiffs assign error upon the refusal of a new trial, and also upon the refusal to strike the defendants' answer.

Brannen & Booth, for plaintiffs.

J. J. E. Anderson, Deal & Renfro, Hines & Jordan, for defendants.

POTTLE, J. (After stating the foregoing facts.)

One ground of the demurrer raised the point that the defendants were not entitled in this action to recoup the damages which they claimed to have sustained by reason of the breach of contract by the plaintiffs. The defendants alleged that the consideration which moved them to execute the note sued on and the deed which was given to secure it was the express contract then and there made with the plaintiffs, under which they agreed to hold the defendants' cotton until instructed by them to sell. "Between the parties themselves any mutual demands, existing at the time of the commencement of the suit, may be set off." Civil Code (1910), § 4340. "Recoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract." Civil Code (1910), § 4350. "It differs from a set-off in this: The former is confined to the contract on which plaintiff sues, while the latter includes all mutual debts and liabilities." Civil Code (1910), § 4351. "Recoupment may be pleaded in all actions ex contractu, where from any reason the plaintiff under the same contract is in good

conscience liable to defendant. And in all cases where, under the laws of this State, recoupment may be pleaded, if the damages of the defendant shall exceed, in amount, those of the plaintiff, the defendant shall in such cases recover of the plaintiff the amount of the excess." Civil Code (1910), § 4353; *Hatcher v. Comer*, 73 Ga. 418. Under these sections of the code it is clear that there was no merit in this ground of the demurrer.

The further point is made that the defendants should not be permitted to set up the parol agreement with the plaintiffs, because to do so would be to add to or vary the written contract, it being claimed that inasmuch as one of the writings comprising the contract stipulated that the defendants would deliver the cotton to the plaintiffs for sale for account of the defendants, it would be a variance from this contract to permit proof of the contract as relied on by the defendants. There is no merit in this point, because it is expressly alleged in the answer that when the plaintiffs demanded of the defendants additional security for the advances which had been made and which were to be made in the future, the defendants consented to execute the note and the deed upon the express agreement of the plaintiffs not to sell the cotton until instructed so to do by the defendants. Under this allegation of the answer the plaintiffs' promise was a consideration for the execution of the note and the deed. The plaintiffs seek not only a general judgment on the note, but a special judgment against the land described in the deed; and, as the consideration of a deed may always be inquired into when the principles of justice require it (Civil Code (1910), § 4179), this ground of the demurrer was properly overruled.

The point is made by demurrer, objections to the evidence, and exceptions to the judge's charge, that the contract relied on by the defendants as the basis of the plea of recoupment was too uncertain and indefinite in its terms to be capable of enforcement, and that the defendants can not arbitrarily select December 2 and December 12 as the dates from which they estimate the amount of damages which they sustained; and it is further insisted that even if the contract was sufficiently definite and certain to be otherwise capable of enforcement, under the law applicable to the case the plaintiffs had a right to sell the cotton without any instructions from the defendants, for the purpose of reimbursement

for advances made. The plaintiffs had an agency coupled with an interest, and, as such agents, had a right, in the absence of a special contract, to sell the cotton, in their discretion, to reimburse themselves for advances previously made. Where there is an agency coupled with an interest, unreasonable instructions detrimental to the agent's interest may be disregarded. Civil Code (1910), § 3576; *Gordon v. Cobb*, 4 Ga. App. 49 (60 S. E. 821). But where a factor and his principal have entered into an express contract fixing the price at which the goods consigned are to be sold or the time when the sale shall be made, the parties are bound by such a contract to the same extent and in the same way that parties are ordinarily bound by their contracts.¹ *Brown v. McGran*, 14 Pet. (U. S.) 550 (10 L. ed. 479). If the contract was actually made as contended by the defendants, the plaintiffs were guilty of a conversion in selling the cotton without instructions, and an action of trover could have been maintained against them for the recovery of the cotton or its value. In the case of *Whigham v. Fountain*, 132 Ga. 277 (63 S. E. 1115), this course was pursued. It appeared in that case that the plaintiff sent to factors a certain lot of cotton upon which they advanced him money, and it was expressly agreed between the plaintiff and the factors that the cotton was not to be sold to cover the advances, except by the plaintiff's consent and after due notice to him. The Supreme Court held that the parties were bound by this contract, and that the plaintiff was entitled to recover in trover the highest proved value of the cotton between the date of the conversion and the date of the trial. It necessarily follows from this decision that where the owner of the cotton elected to wait until sued for the advances made by the factor, he would have a right to rely upon the fact that the factor had damaged him in a sum greater than the amount sued for, by selling the cotton without any instruction from him to do so, and in violation of an express contract made between the parties. In this case the defendants selected two dates and calculated the damages which they claimed to have sustained upon the market price of cotton on these dates. One of the defendants testified that he had actually sold cotton in Savannah on those two dates, knew what the market price was at that time, and would have then sold the cotton which he had consigned to the plaintiffs, if he had had it. Without reference to whether the statement as to what the defendant would

have done is too uncertain in an ordinary case, it has no application here; because he would have had a right to take as the basis for the estimate of damages the highest market value of the cotton on any date between the time of the conversion by the plaintiffs and the date of the trial. *Gray v. Bass*, 42 Ga. 270; 3 Am. & Eng. Ency. L. (1st ed.), 329. It can afford the plaintiffs no ground of complaint that the defendants selected December 2 and December 12. Especially so in view of the fact that there was evidence showing that at a later date cotton was worth more in the market in Savannah than it was on these two dates. The court did not err in overruling the ground of the demurrer to the defendants' answer hereinbefore referred to, nor was there any error in admitting evidence or in charging upon the theory that if the defendants proved the contract which they alleged to have been made, they would be entitled to recover against plaintiffs whatever damages they could show they had sustained. The demurrer, having been filed more than a year after the filing of the answer, can not be considered, save in so far as it raised the question that the answer did not set forth any defense to the action. The judge's charge was sufficient on the question of the measure of damages, in the absence of a request for more specific instructions. There was enough in the charge for the jury to understand that if they found in favor of the defendants they were to find the amount of the difference between the sum realized by the plaintiffs for the cotton and the price they could have realized on the dates on which market value was shown, and that if this sum exceeded the balance of advances for which the plaintiffs sued, the defendants would be entitled to recover the difference.

The evidence was conflicting, but there was testimony directly substantiating the allegation in the answer with reference to the contract relied on by the defendants, and the verdict was fully supported by the evidence.

Judgment affirmed.

3816. FLOWERS *v.* STRICKLAND.

The individual assets of a member of a partnership can not be subjected to a judgment against the partnership alone and not against the individual partners.

DECIDED MARCH 6, 1912.

Affidavit of illegality; from city court of Reidsville—Judge Collins. September 4, 1911.

F. Willis Dart, for plaintiff in error.

RUSSELL, J. Flowers & Whilden brought suit in the city court of Tattnall county against W. L. Strickland, to recover the unpaid balance of the purchase-price on the alleged sale of a piano. The petition was brought in the name of Flowers & Whilden, a partnership alleged to be "composed of _____ Flowers and E. B. Whilden." Strickland filed a plea of set-off, and upon the trial the jury sustained his contention and rendered a judgment in favor of the defendant, against the partnership of Flowers & Whilden. The judgment was rendered March 6, 1906. On December 30, 1910, the fi. fa. issued upon the above judgment was levied upon a lot in the city of Douglas, as the property of W. R. Flowers. He interposed an affidavit of illegality, containing two grounds: (1) that he had never been served with any process or other notice of the pendency of the suit whereupon said execution is based, nor did he waive service, nor did he appear in or defend said suit; and (2) that the execution is against Flowers & Whilden, and not against the deponent W. R. Flowers, and for that reason could not proceed against the individual property of the deponent, which is not subject to the execution. It will be noted that there was no judgment taken against the individuals composing the firm of Flowers & Whilden; also that in the original petition filed by Flowers & Whilden the initials of Flowers are not given. The partnership is said to consist of "_____ Flowers and E. B. Whilden." It is needless to determine whether the defendant, when he filed his set-off, might have had the individual members of the plaintiff partnership served, and thus have bound them individually for any judgment rendered in his favor. It is a matter also of some interest to conjecture what might have been the effect if Flowers had been present participating in the trial, and in that event an individual judgment had been asked.

Regardless, however, of the first ground of the affidavit of illegality, we are clear that the court erred in striking the affidavit, because the second ground is meritorious. The name of W. R. Flowers does not appear anywhere in the proceedings introduced in evidence in the trial in the court below. To bind individual assets of a partner, the partner himself must be served and must have had

his day in court. The execution can not be made broader than the judgment, nor the judgment be broader than the original proceeding upon which it is based. For this reason we think the illegality should have been sustained. *Judgment reversed.*

3817. DORNBLATT v. CARLTON.

Where one contracts with the owner of a house to install therein a heating plant of a certain character and quality, and the plant actually installed is inferior to that contracted for, the measure of the owner's damage is the sum required to make the plant conform to the specifications fixed by the contract. This rule is not in a particular case varied by reason of the fact that the contractor offers to make the necessary changes for a specified sum, and to give bond for the faithful performance of the work.

DECIDED MARCH 6, 1912.

Action on contract; from city court of Athens—Judge West. October 20, 1911.

Blanton E. Fortson, John J. Strickland, for plaintiff in error.
Cobb & Erwin, contra.

POTTLE, J. Carlton employed Dornblatt to install a hot-water plant in his dwelling, and paid him the full amount of the purchase-price, upon Dornblatt's assurance that the work would prove satisfactory and that if it did not, he would make it so. The work not proving satisfactory, Carlton had it overhauled at an alleged expense of \$687.67, for which he sued Dornblatt. The jury found for Carlton \$604.87 principal, and Dornblatt's motion for a new trial was overruled. The only defense insisted upon here is that inasmuch as Dornblatt offered to make the necessary changes for \$175, and to give bond for the satisfactory performance of the work, this sum fixed the measure of the plaintiff's damage.

We can not assent to this view. The questions for the jury were: Was Carlton damaged? And if so, how much? The defendant's estimate of the sum necessary to bring about a compliance with his contract was not conclusive, nor did his offer to give bond to do the work for the sum so fixed by him bind the plaintiff to entrust the repairs to him. Assuming, as the jury found, that it would cost slightly more than \$600, the plaintiff was not bound to give the defendant an opportunity to do further unsatisfactory work, merely

because he offered a bond, upon which the plaintiff might sue for the ultimate damages he would sustain. The jury found that the defendant had failed to perform his contract. The plaintiff had a right to have the work done in accordance with this contract and charge the defendant with what the repairs were reasonably worth in the market. The verdict was warranted by the evidence, and no error of law was committed.

Judgment affirmed.

3818. *SATTERFIELD v. AYERS & CUNNINGHAM.*

HILL, C. J. 1. Where an attorney, in the argument of a case before the jury, uses improper language which is claimed to be prejudicial, it is the duty of the attorney for the opposite party to invoke a ruling of the trial judge thereon, either by the declaration of a mistrial or by reprimanding the offending attorney and giving proper instructions in reference to the language so used to the jury; and where no such action is invoked, the use of the improper language can not subsequently be made a ground of a motion for a new trial. *Lavender v. State*, 9 Ga. App. 856 (72 S. E. 437).

2. Except as above decided, no error of law is complained of; and the verdict is supported by the evidence.

Judgment affirmed.

DECIDED MARCH 6, 1912.

Action for breach of warranty; from city court of Hartwell. October 31, 1911.

A. A. McCurry, for plaintiff in error.

J. H. Skelton, contra.

3820. *SIMS-McKENZIE GRAIN CO. v. PATTERSON & CO.*

Where a purchaser fails to take and pay for goods sold, and the measure of the seller's damages is the difference between the contract price and the market price at the time and place of delivery, before the seller can conclude the purchaser upon the question of damages by a resale of the rejected goods it is essential that he should notify the purchaser of his intention to resell. A petition for damages, brought by a seller of goods against a purchaser who refused to take and pay for the goods, is subject to demurrer when it neither alleges the market value of the goods at the time and place of delivery, nor that after notice to the purchaser the goods were resold by the seller and a price less than the agreed price realized at the resale.

DECIDED MARCH 6, 1912.

Action for damages; from city court of Atlanta—Judge Reid.
October 14, 1911.

Walter A. Sims, for plaintiff in error.

R. H. Jones, Alfred C. Broom, contra.

POTTLE, J. The allegations of the plaintiff's petition, so far as necessary to an understanding of the opinion about to be rendered, are as follows: Damages are alleged in the sum of \$272 for the breach of a written contract, under the terms of which the plaintiff sold to the defendant 5 cars of oats, to contain 5,000 bushels, which were to be shipped in February, buyer's option, and for which the defendant was to pay 58 cents per bushel, "f. o. b. Atlanta." The oats not having been ordered out, the petitioner alleges their shipment in four cars, each containing 1,250 bushels, on February 28. The petition further alleges, that upon the arrival of the oats in Atlanta, the defendant accepted one car and rejected the others; that after tender and refusal to accept, and further refusal to pay for the oats as contracted for, the plaintiff availed itself of the right to resell the oats, and on the 25th of March, through its broker, did sell the oats under the highest offer, of 52 cents per bushel. The following damages were alleged as arising out of and incident to the aforesaid breach of the contract: difference between contract price and resale price, \$225; demurrage, \$38; brokerage on reselling, \$9. The defendant demurred to the petition, upon the following grounds: (1) because it set forth no cause of action; (2) because, under the contract, the oats were to be shipped in 5 cars of 1,000 bushels each, and it appeared from the petition that they were shipped in 4 cars of 1,250 bushels each; (3) because the petition failed to allege what was the difference between the contract price and the market price of the oats at the time and place of delivery; (4) because the petition failed to allege that the defendant was notified of the plaintiff's intention to resell the oats, and of the time and place of the resale; (5) because it appeared from the petition that the resale of the oats was unreasonably delayed; (6) the item of \$38, demurrage, should be stricken; (7) the items for brokerage and resale should be stricken. The demurrer was overruled and the defendant excepted.

"If a purchaser refuses to take and pay for goods bought, the seller may retain them and recover the difference between the contract price and the market price at the time and place for delivery;

or he may sell the property, acting for this purpose as agent for the vendee, and recover the difference between the contract price and the price on resale; or he may store or retain the property for the vendee and sue him for the entire price." Civil Code (1910), § 4131. In the present case the seller elected to resell the property. The theory of the petition is that the defendant is bound for the difference between the contract price and the price realized at the resale, without reference to whether the latter price represents the market value of the oats or not. There are no allegations in the petition that the defendant was notified of the plaintiff's intention to resell. Before the plaintiff could avail itself of the special statutory right to resell the property and conclude the defendant on the question of damages by the price realized at the resale, it was absolutely necessary that notice should be given, though it was not essential that the notice embrace information as to time and place of the sale. *Green v. Ansley*, 92 Ga. 647 (19 S. E. 53, 44 Am. St. R. 110); *Mendel v. Miller*, 126 Ga. 834 (56 S. E. 88, 7 L. R. A. (N. S.) 1184). The decision in *Davis Sulphur Ore Co. v. Atlanta Guano Co.*, 109 Ga. 607 (34 S. E. 1011), does not rule to the contrary. The headnote in that case is somewhat misleading, but the opinion is very clear in laying down the rule above announced. Indeed, it appeared in that case that the goods were never tendered, no demand for payment was ever made, and the goods were resold before the time for payment or that for delivery had arrived. Where the seller fails to give notice, he can still hold the purchaser liable for the difference between the contract price and the market price of the goods at the time and place of delivery, without reference to what disposition is made of the rejected goods. In the present petition there is no allegation in reference to the market price of the goods at the time and place of delivery. In the absence of a notice of intention to resell the goods as agent of the purchaser, the purchaser was not bound by the price realized at the time of the resale. It can not be said, as a matter of law, in the present case that the seller delayed unreasonably in making a resale of the goods. The contract was for 5 cars of 1,000 bushels each. It was a substantial compliance therewith to ship the oats in 4 cars of 1,250 bushels each. The defendant was not chargeable with demurrage, nor with brokerage charges resulting from a resale of the oats. There being no allegation as to what was

the market value of the oats at the time and place of delivery, and no averment that notice had been given the purchaser, as the Civil Code (1910), § 4131, requires, the petition was subject to the demurrer filed thereto, and should have been dismissed.

Judgment reversed.

3821. SOUTHERN RAILWAY COMPANY *v.* FLANIGAN.

1. In the absence of statutory prohibition or regulation, a railroad company may adopt a rule that certain passenger-trains, running regularly on its road, will stop only at designated places.
2. Where a common carrier sells to a person a ticket between two points on its line of road, and the ticket contains no express restriction as to the train or trains on which it will be accepted for passage, the holder thereof has the right to assume, in the absence of any information, actual or constructive, to the contrary, that he may ride on the ticket to his destination as indicated by the ticket, on any train of the company carrying passengers to that point.
3. Where a person, having bought his ticket to a particular station on the line of the railroad, boards a passenger-train of the company in ignorance of the fact that the train makes no stop at that particular place, it is the duty of the conductor, when he first discovers the passenger's mistake, to inform him of the fact, in order that the passenger may exercise his option to remain on the train to the point to which his ticket entitles him to ride, or to disembark at some station where the train does stop. The passenger can not be treated as a trespasser before reaching the station called for by his ticket; and if, over his protest, he is compelled by the conductor to leave the train before reaching it, his wrongful expulsion is a tort for which the railroad company is responsible in damages.

DECIDED MARCH 6, 1912.

Action for damages; from city court of Atlanta—Judge Reid.
October 21, 1911.

McDaniel & Black, E. A. Neely, for plaintiff in error.

J. T. Moore, Moore & Branch, contra.

HILL, C. J. The plaintiff's petition alleges, that on March 26, 1910, she bought a ticket from the agent of the Southern Railway Company at Science Hill, Kentucky, entitling her to transportation to Jenkinsburg, Georgia, and, after purchasing the ticket, boarded one of the regular passenger-trains of the defendant company with her six children, for the purpose of going to Jenkinsburg, to which place the train was going. When she arrived at Atlanta, Georgia, she was for the first time informed by the conductor of the train

that the train she was on was a through train, and did not stop at Jenkinsburg, and that she would have to leave the train in Atlanta and wait for another train, in order to complete her trip to Jenkinsburg. The train arrived in Atlanta about eleven o'clock at night, and when the conductor told her that she could not continue her trip to Jenkinsburg on that train, and would be compelled to leave it, she objected to being put off in Atlanta and insisted upon continuing her trip to Jenkinsburg on that train. Nevertheless, the conductor would not permit her to complete her trip to Jenkinsburg, and she was thus compelled to leave the train and to wait in Atlanta from eleven o'clock that night until 7.30 o'clock next morning. She was practically without money, was an entire stranger in Atlanta, and was in a delicate state of health at the time. In this situation she was compelled to sit up in the depot in Atlanta all night with her children. She was caused great anxiety and physical suffering, suffered much pain and discomfort by reason of having to stay over in Atlanta and sit up all night, and was rendered ill by the worry, anxiety, and discomfort thus suffered by her, and she continued to suffer for several weeks as a result of these facts. She alleges that the conduct of the conductor in compelling her to leave the train in Atlanta, under the circumstances stated, amounted to an expulsion; that, having purchased a ticket to Jenkinsburg, she was entitled to be carried on that ticket to that point; that she was not informed when she boarded the train at Science Hill that the train was a through train and would not stop at Jenkinsburg, and that she would have to remain in Atlanta for another train, and she was for the first time informed of this fact by the conductor on reaching Atlanta. She sues to recover damages, both compensatory and punitive, for the tortious conduct of the conductor.

The defendant filed a demurrer, on general and special grounds. Some of the special grounds were sustained, with leave to amend, and some were overruled. The general demurrer was overruled, and to the judgment overruling this general demurrer the defendant excepted.

Three questions are raised by the record: (1) as to the right of the railroad company to promulgate rules regulating the running and stopping of its trains at stations, requiring some trains to run through without stopping, except at designated stations on its

line, and others to stop at all stations; (2) as to the duty of one who buys a ticket to inform himself on what train the ticket would entitle him to transportation; and (3) as to the rights of the passenger who ignorantly boards a train which does not stop at the station to which he has bought a ticket, and the correlative duty of the conductor of the train when he discovers that such passenger is on the wrong train.

1. In the absence of statutory regulation or prohibition, a railroad company may adopt regulations that certain passenger-trains, running regularly on its road, shall stop only at designated stations. There can be no doubt that such rules and regulations are reasonable and are necessary in the proper conduct of the business of the railroad company. Civil Code (1910), § 2729; *Southern Ry. Co. v. Watson*, 110 Ga. 681 (36 S. E. 209); *Hart v. Southern Ry. Co.*, 119 Ga. 927 (47 S. E. 206, 100 Am. St. R. 212); Hutchinson on Carriers (3d ed.), § 1060. But a rule, however reasonable, should be enforced with due regard to the obligation of extraordinary diligence which the law imposes upon carriers of passengers.

2. It is insisted by counsel for the plaintiff in error that a passenger is bound to inquire and ascertain whether the train which he proposes to take stops at the station to which his ticket entitles him to ride; that if, without inquiry, he boards a train which, by the regulations of the carrier, does not stop at his destination, he can not require the train to be stopped at such destination; but that he may lawfully ride to the nearest point short of his destination where the train regularly stops; and it is said that there is no allegation in the petition that the plaintiff made any effort to have the train on which she had taken passage stop at the nearest point short of Jenkinsburg, the particular station to which she had bought a ticket, nor in fact that Atlanta was not the nearest schedule stop of that train to Jenkinsburg. The rule as claimed by the plaintiff in error is unquestionably supported by great weight of authorities, both text-writers and decisions of courts. Hutch. Carr. (3d ed.) § 1060, and cases cited in the notes; 4 Elliott, Railroads, 1593; 3 Thomp. Neg. § 2562. Discussing this subject, Thompson, in his Commentaries on Negligence, *supra*, declares that "it is the duty of a person before taking passage upon a railroad train to use reasonable diligence, by inquiring of the station agent or the conductor of the train, or by reading the published schedules of the train, or by

other means, to ascertain whether or not the particular train stops at this particular place of destination;" and he cites in support of this rule several decisions in the notes, which hold, in effect, that where an intended passenger purchases a ticket at the company's office when the train is about to depart in the direction in which he wishes to go, without making inquiry as to whether or not the train will stop at the particular station to which he has purchased the ticket, and after boarding the train he learns for the first time that the train will not stop at that station, he has no redress against the company, either for carrying him beyond his particular station, or for requiring him to get off at an intermediate station. In the case of *Texas & Pacific Railway Co. v. Ludlam*, 57 Fed. 481, Judge Pardee, speaking for the Circuit Court of Appeals of the fifth district, announces the rule as follows: "It is the duty of the person about to take passage on a railroad train to inform himself when, where, and how he can go or stop, according to the regulations of the railroad company; and if he makes a mistake, not induced by the company, against which ordinary care in this respect would have protected him, he has no remedy against the company for the consequences." And he further holds that where a train not scheduled to stop at a certain station is boarded by a person holding a ticket for such station, without informing himself whether he can stop there or not, the failure of the conductor to inform him at the first opportunity that the train does not stop there, so that he can exercise the right of stopping at some intermediate station, is not a breach of the company's obligation, so as to render it liable for damages caused to a passenger by being put off at the last preceding station where he is subjected to great inconvenience and exposure. As to this latter point there was a dissenting opinion by Judge Locke, district judge. Thompson, in his *Commentaries on Negligence* (vol. 3, § 2563), declares that the decision of the majority of the United States Circuit Court of Appeals on this point, "though rendered by a Federal court of appeals, can not make a rule of law so palpably unreasonable, so unjust, and so opposed to public right."

We can not fully subscribe to the soundness of the rule that one who proposes to become a passenger is bound to inquire, when he purchases his ticket, and before he boards the train, to ascertain whether the train which he proposes to take, according to its sched-

ule, stops at the particular place on the line of the railroad to which his ticket entitles him to ride. It seems to this court that the sounder rule on the subject is to impose upon the railroad company the duty of giving the information to the purchaser of the ticket over its railroad as to what train stops at the particular station to which it sells the ticket and not to impose the duty of inquiry upon the proposed passengers. Agents who sell tickets know the schedules of the company's trains, and it would seem to be more reasonable to require that this information should be given to the passenger when he proposes to buy his ticket to a particular station, than it would be to require the passenger before or when he purchases the ticket to make the inquiry. A ticket over a railroad is not only a receipt for the money paid for the ticket, but constitutes a contract between the passenger and the company for transportation according to its terms; and in the carrying out of the contract the law of this State imposes upon the carrier extraordinary diligence to protect the passenger, and certainly it seems unreasonable to hold that the full measure of the carrier's diligence has been reached unless he gives this information in his possession so important to the exercise by the passenger of the right to which he is entitled under his contract as evidenced by the ticket. When a passenger buys a ticket, he has a right to presume that all necessary information or instructions will be given him for the proper use of that ticket. And when one who proposes to become a passenger buys a ticket from an agent of the carrier to a particular station, he has a right to assume, in the absence of any information, actual or constructive, to the contrary, that he may ride on that ticket to his destination on any train of the company carrying passengers to that place. Certainly this should be the rule, in the absence of any restriction in the ticket itself, showing that it is not good for transportation to the particular station to which it has been purchased. When a person goes to a railroad station and buys a ticket from the agent of the company, the reasonable inference from that act is that he intends to become a passenger to his destination on the next train passing the initial point and going to the particular place designated by the ticket; and if the next train is a through train, or one that does not stop at that station, the agent of the company, when he sells the ticket to the proposed passenger, should inform him of the fact. In *Atkinson v Southern Ry. Co.*,

114 Ga. 146 (36 S. E. 888, 55 L. R. A. 223), it is held, that, "when a railroad company places an agent in charge of its business at a place where passengers are expected to board its trains, and authorizes such agent to sell tickets to passengers, to be used when taking passage upon its trains, one who purchases from such an agent a ticket upon which there is no statement as to what trains it will or will not be good for passage upon has a right to presume that the agent is authorized by the company to give him information on this subject." Of course, if the proposed purchaser should ask for the information, it would be the duty of the agent to give it to him, and the company would be held responsible for the correctness of the information. *Atkinson v. Southern Ry. Co.*, supra. But we think the rule should go further and make it the duty of the agent, having reason to believe that the purchaser proposes to take passage on a particular train, to inform him that that train will not stop at the station to which he purposes to purchase a ticket, so that he may regulate his conduct as a passenger accordingly. We frankly admit that this opinion is contrary to the views of many judges and text-writers, but we are nevertheless strong in the faith that it is more in consonance with reason and justice, and more in harmony with the rule of extraordinary diligence which the law imposes upon carriers of passengers. The point has not been expressly ruled by the Supreme Court of this State, but we think the principle herein announced is fairly deducible from several of its decisions. *Central Ry. Co. v. Roberts*, 91 Ga. 513 (18 S. E. 315); *Head v. Georgia Pacific Ry. Co.*, 79 Ga. 358 (7 S. E. 217); *Caldwell v. Richmond & Danville R. Co.*, 89 Ga. 550 (15 S. E. 678); *Pickens v. Georgia R. Co.*, 126 Ga. 517 (55 S. E. 171).

3. But even if it be conceded that the rule is as claimed by the plaintiff in error, yet, under the allegations of the petition, or reasonable deductions therefrom, a cause of action was set out. If a passenger boards a train which, according to schedule, does not stop at the station called for by his ticket, in ignorance of that fact and without making any inquiry in reference thereto, he does not thereby become a trespasser, but he has the right to remain on board the train and to exercise his election as to a station where the train does stop, at which he will get off. As expressed by Thompson in his Commentaries on Negligence (Vol. 3, § 2563): "If the conductor has no authority to vary the rules of the company in regard

to stopping his train at a station where it is not permitted to stop by such rules, then it is the plain duty of the conductor, when he discovers that the passenger has a ticket calling for a place at which the conductor can not stop the train, to inform the passenger of that fact, so that he can exercise his option as to the intermediate place at which he will get off." Applying this rule to the allegations of the petition, we hold that when the conductor of the defendant company first discovered that the plaintiff held a ticket which on its face entitled her to ride to Jenkinsburg, Ga., and that she had, presumptively, ignorantly gotten on a train which under the schedule did not stop at that place, it was his duty then and there to inform her of that fact and give her the opportunity of then getting off of the train and waiting for one that would stop at her place of destination, if under the rules, he had no authority to stop the train at that place. If he had the authority, notwithstanding the rule, to stop the train at Jenkinsburg, having withheld from her information on the subject, and having taken up her ticket, or punched it, which is equivalent to the same thing, it became his duty to stop the train at Jenkinsburg and give her an opportunity of alighting therefrom. "A railroad conductor should not accept from a passenger a ticket to a particular station, knowing that she intends and desires to get off there, unless he intends to stop the train at that station and allow her to alight. If he accepts the ticket, a duty arises to stop the train at the point of destination fixed by the ticket." *Pickens v. Georgia R. Co.*, supra; *Caldwell v. Richmond & Danville R. Co.*, supra.

It is fair to assume, in the light of the general practice of conductors in taking up tickets or fares, that the conductor in the present case discovered, soon after the train left the initial point, that this passenger had a ticket which on its face entitled her to transportation to Jenkinsburg, Ga. He should then have told her that the train on which she was riding did not stop at Jenkinsburg, and have given her the opportunity of getting off at that time, or of making an election to get off at some other station where the train did stop. He could not, in the exercise of that extraordinary diligence which the law imposes upon carriers of passengers, take up the ticket, or any portion thereof, or punch it, thus indicating that the passenger was entitled to ride thereon, and with-

hold from her information as to the fact that she could not continue on that train to Jenkinsburg, and permit her to ride on the ticket all the way to Atlanta, which the court judicially knows is some distance from Science Hill, Ky., and, upon reaching Atlanta at night, inform her for the first time that she was on the wrong train, and then compel her to get off and remain in Atlanta all night, awaiting the arrival of a train on which she could continue her trip to Jenkinsburg. Having brought her on his train thus far on her route without objection, it became his duty, as an agent of the company with whom she had the contract of transportation, to permit her to continue on that train, and to stop and allow her to disembark therefrom at Jenkinsburg. "Where a person, having purchased his ticket for a certain station, gets on a train which makes no stop there, the conductor, by taking and punching his ticket, accepts him as a passenger, regardless of whether he was negligent in getting on the train." *Schurr v. Houston*, 10 N. Y. State Rep. 262; 9 Am. Dig. (Century Edition), title "Carriers," p. 1037, § 1109. While probably this decision goes a little too far in the latter statement relating to negligence in boarding the train, yet, where the passenger has been guilty of no negligence, the principle announced in it is pertinent and sound.

It is conceded by learned counsel for the plaintiff in error that the plaintiff might lawfully have ridden on her ticket to the nearest point short of her destination, and it is stated that there is nothing in the allegations of the petition to negative the assumption that she was entitled to do this, since it is not alleged that Atlanta was not in fact the nearest schedule stop of the train upon which she was riding; but we think that if a person purchases a ticket to a particular station, and ignorantly boards a train which does not stop there, he is entitled at his option to ride as far as that station, and can not be treated as a trespasser and forced to leave the train until after the station is reached. The conductor must leave to the passenger the right to remain on the train until the place called for by his ticket is reached, if the passenger desires to do so; for the passenger would have that right even if the train did not stop there. The conductor would only have the right to eject the passenger after the station was reached where the train did not stop and the passenger remained thereon without paying fare. 3 Thomp. Neg. § 2568. The view, however, that we have announced in this

opinion renders this point immaterial. Having accepted her as a passenger and permitted her to ride all the way to Atlanta on the ticket, the company had no right to arbitrarily break their relationship, or to temporarily suspend it. The conduct of the conductor in bringing her thus far on her route and in withholding from her the information that the train did not stop at Jenkinsburg amounted to a waiver of the rule in the particular instance relating to the stopping of the train at Jenkinsburg. The enforcement of the rule, under the circumstances, was unreasonable and unwarranted, and was a breach of that extraordinary diligence which the statute imposed upon the carrier. In *Caldwell v. Richmond & Danville R. Co.*, supra, it is held that a railroad company which, as a common carrier, receives a passenger, and collects her ticket to a particular station, with knowledge on the part of the conductor that she intends and desires to leave the train at that station, is charged by law with the duty of stopping the train at that station and affording her an opportunity to get off, and failure to perform such duty is not only a breach of contract, but a tort for which an action is maintainable. See, also, *Williamson v. Central Railway Co.*, 127 Ga. 125 (56 S. E. 119).
Judgment affirmed.

3830. *LANGLEY MANUFACTURING CO. v. FREY & CO.*

- POTTE, J. 1. A petition for certiorari should not be dismissed for want of an assignment of error, when it sets forth the evidence alleged to have been introduced at the trial, the judgment of the inferior judicatory, and avers that the judgment is contrary to law, contrary to evidence, and decidedly and strongly against the weight of the evidence.
2. Where there is no disputed issue of fact, the judgment of the inferior judicatory may be reviewed by certiorari. *Toole v. Edmondson*, 104 Ga. 776 (31 S. E. 25).
3. The monthly wages of one employed to check cotton as it is weighed and classified, and who also works as a stenographer, typewriter, and letter filer, are not subject to the process of garnishment. *Cohen v. Aldrich*, 5 Ga. App. 256 (62 S. E. 1015).
4. The certiorari should have been sustained, and a new trial ordered, but as the evidence on the new hearing may be different, a final judgment should not be entered. *Almand v. Georgia R. Co.*, 102 Ga. 151 (29 S. E. 159).
Judgment reversed.

DECIDED MARCH 6, 1912.

Certiorari; from Richmond superior court—Judge Hammond. October 13, 1911.

J. M. Hull Jr., Lansing B. Lee, for plaintiff in error.

A. R. Williamson, M. C. Barwick, contra.

3834. TYRE *v.* JONES.

POTTLE, J. No error of law is complained of, and the verdict was warranted by the evidence. *Judgment affirmed.*

DECIDED MARCH 6, 1912.

Complaint; from city court of Dublin—Charles Akerman, judge pro hac vice. September 30, 1911.

J. S. Adams, for plaintiff in error.

3838. MAYOR AND COUNCIL OF AMERICUS *v.* GARTNER.

POTTLE, J. 1. It is the duty of a municipal corporation to use ordinary care to keep the streets over which it has control in a safe condition for travel both by day and by night. *Holliday v. Athens*, ante, 709.

2. Under the evidence, the proximate cause of the plaintiff's injury was an elevation which had been negligently permitted by the city to remain in one of its public streets. The jury were warranted in finding that the plaintiff could not, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence; and, no error of law being complained of, the verdict in the plaintiff's favor will not be disturbed. *Judgment affirmed.*

DECIDED MARCH 6, 1912.

Action for damages; from city court of Americus—Judge Littlejohn. October 6, 1911.

R. L. Maynard, Ellis, Webb & Ellis, for plaintiff in error.

W. P. Wallis, Jones & Childers, E. A. Nisbet, contra.

3857. McCARTER *v.* McCARTER.

1. A contract between the father and mother of minor children, under the terms of which it is agreed that the parties shall thereafter live in a state of separation, each having the custody of the children at specified intervals of time, the father to pay for the education of the children, there being no express stipulation as to who shall support and maintain them, does not release the parental rights of the father to the mother, within the meaning of the Civil Code (1910), § 3021, nor relieve

the father from the legal obligation resting upon him to support the children.

2. Where such a contract has been entered into and the mother pays for necessary medicine and the services of a physician for such minor children, she may maintain an action against the father for the amount thus expended.

DECIDED MARCH 6, 1912.

Certiorari; from Walker superior court—Judge Maddox. October 13, 1911.

J. E. Rosser, R. M. W. Glenn, for plaintiff.

James P. Shattuck, for defendant.

POTTLE, J. In a suit on an open account in a justice's court the plaintiff recovered a verdict for \$15.55. The defendant's certiorari was sustained by the judge of the superior court, and final judgment awarded in his favor, and the plaintiff excepted. The facts are unusual. The plaintiff is the wife of the defendant. On April 9, 1910, they separated by mutual agreement, and at that time entered into a written contract containing substantially the following provisions: Defendant was to pay to plaintiff \$1,400 in settlement of any claim for alimony which she might have, and as the purchase-price of a certain described tract of land belonging to her. In addition to this she was given specified personal property and household effects. There were two minor children. It was agreed that the children should remain with their mother from Monday in the forenoon until Friday afternoon, and the father was to have the privilege of having the children with him the remaining portion of the week. Neither parent was to interfere with the custody or control of the children while they were with the other parent, but each parent was to have the right at all times to visit the children, so as to look after their welfare, wherever they might be located. It was further agreed that the children should be sent to school for a specified number of months, and that the father should buy their books and pay their tuition. The father was likewise to furnish one of the children with clothing, upon condition that this child should attend school, and the father was to have the "privilege" of bringing such things as he might deem proper at any time to the other child, a daughter. Both of the parties to the contract agreed to work for the interest and welfare of their two children. It was finally agreed that neither of the parties should have any right to bring suit for the custody or control of the chil-

dren, nor should the wife have any action for alimony, and, except as above stated, there was nothing in the contract in reference to the support of the children. The account sued on was for sums of money which the plaintiff had paid to a drug company and a physician for drugs and medical attention for the children. The account as originally made was charged to the plaintiff, and the indebtedness was incurred by her without the knowledge or consent of her husband. She paid the account and brought suit against her husband to recover the amount thereof.

In this State a father may by voluntary contract release the parental rights over his minor child to a third person. Civil Code (1910), § 3021. When a father makes an absolute and unconditional gift of his minor child to another, and the gift is accepted and the child taken into the home of the donee, the latter is entitled to the proceeds of the labor of the child, and is bound for its care, maintenance, and support, in the absence of any express agreement, or any facts or circumstances from which the contrary would be implied. *Eaves v. Fears*, 131 Ga. 820 (64 S. E. 269). We know of no reason why the rule just stated would not be applicable to the mother of the child as well as to any other person. Indeed, there are many reasons why the rule should be more peculiarly applicable to a mother than to one not related to the child. Where husband and wife separate and no provision is made for her support, either voluntarily or by decree of the court, the husband is liable to third persons for the board and support of his wife and necessities furnished to her or for the benefit of his children in her custody. Civil Code (1910), § 2988. "The rights of children under any deed of separation or voluntary provision or decree for alimony shall not be affected thereby." Civil Code (1910), § 2990. Where, on account of the husband's misconduct, the wife obtains a divorce and a decree awarding to her the custody of the minor children, and no provision is made in the decree for the support of the children, the father is not relieved from his obligation to furnish such support. If he should fail to do this, and the mother makes expenditures for the proper support of the children, she can recover from the father the amount of these expenditures. *Brown v. Brown*, 132 Ga. 712 (64 S. E. 1092, 131 Am. St. R. 229). In the case just cited the Supreme Court expressly stated that it did not mean to hold that in an action brought by the

wife for the recovery of expenditures made by her in support of the child after she obtained the decree awarding to her the custody of the child, it would not be a good defense for the husband to show that, in consideration of his withdrawing any objections to the award of the custody of the child to her, she agreed to thereafter support the child and to relieve him from liability for its support. Without reference to what might be the result of a third person's furnishing necessities to a child which its father failed to support, where such person had no notice that the father had released his parental rights over the child, and without reference to whether the mere custody of a minor child by a third person would be enough to put one furnishing necessities for the child upon inquiry, to ascertain whether the father had surrendered his control over the child, it is clear that where the father has done so, and the person furnishing the support has notice of the fact, he can not maintain an action against the father. The real question in the present case is whether or not the agreement entered into by the husband and wife on April 9, 1909, had the effect of releasing the parental rights of the father over his minor children and surrendering them to the mother, and of imposing upon her the corresponding obligation to support the children. We think the true rule is that before a father will be held to have, by contract, surrendered control over his minor child and become relieved of the obligation to support it, an agreement to this effect must be shown, clear and definite in its terms. It ought to take a strong case to relieve a father from the legal and moral obligation resting upon him to care for and maintain his minor child. In this case an inspection of the agreement between the parties shows that no provision was expressly made for the support of these children. The father did not surrender his parental control over his children, but, on the contrary, while the custody was with the mother for a larger portion of time, the father retained the right to have them with him at stated intervals, and the right to visit the children, "so as to look after their welfare," wherever they might be located. He expressly obligated himself to buy them school-books and pay their tuition, and reserved the "privilege" of giving to his minor daughter such things as he might deem proper from time to time. The contract further provided that both of the parties should "work for the interest and welfare of their two children." In other words, we

construe it as a joint agreement partially fixing the rights and liabilities of each parent simply in order to forestall domestic friction. There was no express agreement that the mother should support these children. Suppose, therefore, she had refused to do it. Could it be said that the father was relieved from the legal obligation resting on him to furnish maintenance for these helpless children? We can not know what the parties had in mind, except as they have expressed themselves in the writing; and, in the absence of an express agreement completely surrendering his parental rights and relieving himself from his legal obligation to support his children, we are unwilling to hold that the father is not liable for necessities furnished to the children, which he himself failed to provide. This being so, the mother had a right to provide the necessities and to look to the father for reimbursement. The verdict in favor of the plaintiff was demanded by the evidence, and the court erred in sustaining the certiorari. *Judgment reversed.*

3858. MCCLURE *v.* DUNCAN.

POTTE, J. The evidence was sufficient to authorize the verdict in favor of the plaintiff in the distress warrant, and the court did not err in overruling the certiorari. *Judgment affirmed.*

DECIDED MARCH 6, 1912.

Certiorari; from Hart superior court—Judge Meadow. October 13, 1911.

Worley Adams, Linton Johnson, for plaintiff in error

3869. FOUNTAIN *v.* FOUNTAIN.

While a cropper has a "mortgageable interest" in the crop, this interest can not be subjected to levy and sale under the mortgage, until the cropper acquires title, and this he can not do "until there has been an actual division and settlement" with the landlord.

DECIDED MARCH 6, 1912.

Levy and claim; from city court of Ashburn—J. W. Haygood, judge pro hac vice. October 18, 1911.

W. T. Williams, J. A. Comer, A. S. Bussey, for plaintiff.

J. H. Tipton, contra.

POTTLE, J. The cropper executed a mortgage upon his interest in the growing crops. To the levy of the mortgage execution the landlord filed a claim. When the case was here before (7 *Ga. App.* 361, 66 S. E. 1020), the court held that the mortgage was valid and enforceable, and that the landlord could not, even with the cropper's consent, defeat the mortgage by applying the mortgaged property to an indebtedness created for supplies furnished the year before. At the second trial it was admitted that at the time of the levy the crop mortgaged was ungathered in the field, and no division had been made between the landlord and the cropper. The plaintiff in fi. fa. offered to show that at the time of the levy the cropper was not indebted to the landlord for supplies or advances. The judge refused to allow this, and entered up a judgment dismissing the levy.

The exact question thus presented is whether or not the interest of the cropper is subject to levy and sale before the landlord has received his half of the crop, but after he has been paid in full for all supplies and advances furnished by him to the cropper. The title to the whole of the crop is in the landlord "until there has been an actual division and settlement." *DeLoach v. Delk*, 119 *Ga.* 884 (47 S. E. 204); *Harley v. Davis*, 7 *Ga. App.* 386 (66 S. E. 1102); *Taylor v. Coney*, 101 *Ga.* 657 (28 S. E. 974); Civil Code (1910), § 3707. The manifest policy of the law is to give the landlord complete control over the crop until he has actually received his portion of the crop and had his lien for supplies and advances paid off in full. While the cropper has a "mortgageable interest" in the crops, such interest can not be subjected to the mortgage debt until the cropper has acquired title; and this he can not do before a division between himself and the landlord. The "interest" may ripen into a title, but there can be no levy before it does. See, in this connection, *Jordan v. Jones*, 110 *Ga.* 47 (35 S. E. 151). If the cropper owes the landlord nothing, there must be some way to protect the creditor. This court has held that garnishment is not the remedy. *Thompson v. Passmore*, 9 *Ga. App.* 771 (72 S. E. 185). A division must be made at some time; but if by collusion the landlord and the cropper attempt to defeat the creditor, by refusing to make a division, or otherwise, undoubtedly equity would afford relief. The case seems to have been submitted to the presiding judge to determine all issues of law and fact. If so, a

judgment should have been entered finding the property not subject to the mortgage fi. fa., but, as the judgment entered was a final termination of the case in favor of the claimant, and he does not complain, the plaintiff in fi. fa. has not been hurt.

Judgment affirmed.

3880. PYLE v. BOOZ.

One who buys personalty from an agent of the owner, with knowledge of the agency, can not, upon failure of the owner's title, maintain against the agent an action for damages for breach of warranty. Where, in the trial of such a case, the evidence is in conflict as to the purchaser's knowledge of the ownership and agency, it is error to direct a verdict in his favor.

DECIDED MARCH 6, 1912.

Complaint; from city court of Floyd county—Judge Reece. October 30, 1911.

M. B. Eubanks, for plaintiff in error.

Dean & Dean, J. M. Hunt, contra.

POTTLE, J. This case is the sequel to that of *Booz v. Neal*, 6 Ga. App. 279 (64 S. E. 1104). After the affirmance of the judgment in that case, as a result of which Booz was compelled to pay off the fi. fa., he sued Pyle, the seller, for breach of warranty, and the trial judge directed a verdict in the plaintiff's favor. Pyle's defense was that he sold Booz the cotton as agent for one Payne, who was present at the sale, and that Booz knew the cotton was Payne's, and therefore took the chances, so far as he (Pyle) was concerned, of a failure of Payne's title. The evidence showed that in 1906 Payne was a tenant on a farm bought from Coker by Pyle, who gave his joint note with Payne at a bank, in order to raise money necessary to make the crop. In the fall Payne had five bales of the cotton ginned in Pyle's name and delivered to Pyle at the warehouse, the receipts being issued in Pyle's name. Pyle went with the receipts to the bank, took up the note which he and Payne had given, and gave his individual note in renewal, hypothecating the warehouse receipts as collateral security. Subsequently Coker levied a distress warrant on the cotton. Pending this levy negotiations were opened for the purchase by Booz from Pyle of a lot of cotton. Coker, having been satisfied, dismissed

his levy, and Pyle sold to Booz nine bales of cotton, including the five bales delivered to him by Payne, paid the note at the bank with a portion of the money, and delivered to Booz the five warehouse receipts. Subsequently Neal levied on the five bales in the possession of Booz, and, when the verdict finding the property subject was approved by this court, Booz paid Neal's claim. Booz sued Pyle for the amount paid by him on the Neal *fi. fa.*, but the judge directed a verdict for the amount paid Pyle for the cotton, a somewhat smaller sum than that paid Neal. Booz testified, that he dealt with Pyle as the sole owner of the cotton, and did not know Payne in the transaction at all, that Pyle claimed he owned it all the time, and that after Coker's claim for rent was settled there was, so far as Booz knew, no other claim against the cotton. Pyle and Payne testified that the cotton was Payne's; and the point in the case is whether there was any evidence from which the jury could find that Booz knew this when he bought the cotton. It is insisted for the defendant in error that Pyle, having taken the warehouse receipts in his name, is estopped to deny his title. If he sold the cotton as his own, he would, of course, be estopped, not so much because of the receipts, but upon the general principle that one who sells property to another and takes the other's money can not be heard, as against the purchaser, to deny his title. But if Pyle sold the cotton as agent of Payne, and Booz knew this, the doctrine of estoppel has no application. We are reluctant to disturb the verdict directed, because it seems to be a manifestly just disposition of the case, but if there is any evidence to support a different result, the trial judge had no power to deny the defendant a jury trial, nor have we authority to uphold him in so doing. While, in the trial of the claim case, Pyle swore pointedly that the cotton was his when he sold it to Booz, having been delivered to him by Payne in settlement of a supply bill, in the present trial both he and Payne testified that the cotton was Payne's and that Booz knew it. We quote from Pyle's testimony: "I had not bought that cotton from Payne, nor never in my life told anybody I bought it from Mr. Payne, only stated it was mine by rights of mortgage and nothing else. I said the cotton was mine by rights under the mortgage and nothing else, never had any more claim on it. . . I did sell that cotton in that transaction for Payne, because Payne told me to do so, then and there,

and Payne was present at the time. Booz knew who that cotton belonged to at that time just as well as I did, because he would not buy it until the levy was dismissed, and I know I would not have gone on my own bond for the cotton." Payne swore: "I paid the interest and put the cotton in there in Mr. Pyle's name, so that he could put up his own note as collateral security to extend my note until he got ready to sell the cotton. Did not sell that cotton to him, only just that agreement. I turned it over to Pyle to sell and apply to these notes . . . Booz knew, at the time he bought this five bales of cotton that it was my cotton he was buying, and that the proceeds were being applied to my debts; he knew it and he went to Coker to find out whether Coker had anything else against the cotton, before he bought it, and came back and said that Coker had a claim for rent for the year before, and he made it up in his own mind that Coker could not collect that and he bought it anyhow." He further testified: "I never told Booz I owned it, but he knew it. He knew it was my cotton, I told him so, and he objected to buying it, because it was levied on, and he afterwards went and got that rent affair out of the way." We think this testimony made a jury question. If Pyle was acting as Payne's agent in making the sale and Booz knew it, Booz can not look to the agent for a breach of the warranty of title. There is nothing in the evidence to demand, even if it authorizes, a finding that Pyle knowingly concealed from Booz the existence of the judgment in favor of Neal which afterwards subjected the cotton, although such concealment would not support the action as brought. There is nothing in the point that because Booz sued for the amount paid by him to Neal, he can not recover his true measure of damages, to wit, the sum paid Pyle for the cotton. We feel constrained to send the case back for a trial before a jury.

Judgment reversed.

3888. PAYNE v. ROME COCA-COLA BOTTLING CO.

Where an action is brought to recover damages for an injury caused by the explosion of a bottle, the contents of which were manufactured, bottled, and sold by the defendant as a harmless beverage, an inference of negligence on the part of the manufacturer arises, when it is shown that all the persons through whose hands the bottle had passed were

free from fault, and that the condition of the bottle and its contents had not been changed since it left the defendant's possession.

DECIDED MARCH 6, 1912.

Action for damages; from city court of Floyd county—Judge Reece. February 18, 1911.

J. L. Tyson, W. H. Trawick, Maddox & Doyal, for plaintiff.

Lipscomb, Willingham & Wright, for defendant.

POTTLER, J. A bottle of Coca-Cola, manufactured and sold by the defendant, exploded, and fragments of glass flew into the plaintiff's eye and destroyed the sight. The plaintiff alleges that the water in the bottle had been charged with carbonic acid gas, and that the explosion was due to the fact that the bottle was too highly charged with the gas by the defendant. A nonsuit was awarded, and the plaintiff excepted.

The bottle of Coca-Cola was bought by the plaintiff's brother from Cook, a retail vender, who bought it from Barnett, to whom it was sold by the defendant. There was nothing in the appearance of the bottle to differentiate it from other bottles of Coca-Cola put on the market by the defendant. Neither the plaintiff nor his brother did anything to cause the explosion, nor had the bottle or its contents been changed in any way since the manufacturer sold it to Barnett. The Coca-Cola, such as was contained in the bottle, was advertised and sold by the defendant as a "refreshing and harmless beverage." A small cap, fastened tightly down, covered the mouth of the bottle. There was no direct evidence in reference to the manner in which the bottle was charged, nor as to the quantity of gas used.

If the plaintiff can recover at all, he can do so only upon an application of the maxim *res ipsa loquitur*. The occurrence was unusual. Bottles filled with a harmless and refreshing beverage do not ordinarily explode. When they do, an inference of negligence somewhere and in somebody may arise. There is no presumption of law, but merely an inference of fact. Negligence is not necessarily to be inferred merely from the act itself, but the tribunal designated by the law to decide the issues of fact may infer negligence from the happening of an event so unusual. So much may be gathered from previous decisions. *Chenall v. Palmer Brick Co.*, 117 Ga. 106 (43 S. E. 443); *McDonnell v. Central Railway Co.*, 118 Ga. 86, 91 (44 S. E. 840); *Palmer Brick Co. v. Chenall*, 119

Ga. 837 (47 S. E. 329); *Monahan v. National Realty Co.*, 4 Ga. App. 680 (62 S. E. 127); *Cochrell v. Langley Mfg. Co.*, 5 Ga. App. 317 (63 S. E. 244); *Sinkovitz v. Peters Land Co.*, 5 Ga. App. 788 (64 S. E. 93); *Central Railway Co. v. Butler*, 8 Ga. App. 243 (68 S. E. 956). In the *Cochrell* case, supra, the Chief Judge called attention to the fact that the doctrine expressed in the maxim *res ipsa loquitur* was the foundation for the rule stated in section 5157 of the Civil Code of 1895 (Civil Code of 1910, § 5743), which is merely a codification of previous decisions of the Supreme Court.

But it is said that before the doctrine can be applied, the act must speak not only of negligence, but of negligence on the part of the defendant. To this, of course, all are agreed. But the argument of the able and earnest counsel for the defendant is, that the principle at the foundation of the maxim can not be applied here, because the bottle was not in the possession or control of the defendant when it exploded; that therefore there can arise no inference that it was negligent; and that if negligence is to be inferred, it must be ascribed to the vender from whom the plaintiff's brother bought the bottle, or to the brother himself. The counsel relies upon language of Mr. Justice Lamar in the *Chenall* case, supra, that, "prima facie, that want of due care should be referred to him under whose management and control the instrument of injury was found." Further along in the opinion the learned Justice said: "All that the plaintiff should be required to do in the first instance is to show that the defendant owned, operated, and maintained, or controlled and was responsible for the management and maintenance of the thing doing the damage; that the accident was of a kind which, in the absence of proof of some external cause, does not ordinarily happen without negligence. When he has shown this, he has cast a burden on the defendant, who may then proceed to show that the accident was occasioned by vis major, or by other causes for which he was not responsible." In the head-note the rule is stated somewhat differently, thus: "Prima facie, such negligence will be attributed to the person charged by law with the duty of maintaining and managing the thing causing the injury." In that case the court discussed and applied the doctrine in favor of one injured by the falling of a brick arch, and did not have in mind such an occurrence as the one presented in the case now at hand. Granting, for the sake of the argument, that,

prima facie, inferential negligence will be imputed to the person who sold the bottle to plaintiff's brother, or to the brother himself, the inference is completely rebutted when it affirmatively appears, as it does here, that neither was at fault, that neither handled the bottle improperly or did anything to change the condition from that in which it was when received. Since for every effect there is a cause, where negligence exists some one must have been the responsible author. If he can be found, it is right that he should pay the penalty. The bottle exploded. / Inferentially some one was negligent. It was not Cook, the last vendor of the bottle, nor the plaintiff's brother, nor the plaintiff, nor yet Barnett, because they all stand exonerated by direct or circumstantial evidence of their freedom from fault. But, the inference of negligence remains, and some one is prima facie to blame. By a process of elimination we get back to the manufacturer who set the dangerous agency in motion, and upon whom the blame ought inferentially to be fastened. It is certainly no hardship to require at the manufacturer's hands an explanation of the occurrence, that the jury may say whether it, like the other persons who handled the bottle, has been exonerated. / If a manufacturer should sell to a jobber a gun, and, after passing through the hands successively of the wholesaler and retailer, it finally reaches the marksman, and explodes in his hands while being used in the ordinary and usual manner, and injury results, it is plain that there was a defect in the gun. Somebody ought to be responsible. Concede that inferentially it could be said that the marksman must have done something to the weapon to cause it to explode, if he disproves this, and the retailer, the wholesaler, and the jobber all in turn show that they kept and handled the gun in the usual way, and did nothing to change its condition, the inference of negligence would be shifted back upon the manufacturer, who put the weapon of destruction in circulation with his indorsement that, when used in the ordinary and usual manner, no harm would come to him who used it. In such a case it would be no answer, when the maxim that the thing spoke for itself is invoked, to say that when the injury resulted, the thing was not in the possession, power, or control of the manufacturer.

Under the proved facts, the occurrence speaks of the defendant's negligence, and its alone. The inference is that it was neg-

ligent in the manner alleged in the petition. It charged the bottle with carbonic acid gas, it put together the constituent elements of the beverage, it manufactured or procured the bottle to hold these elements, and it put the bottle in circulation, with an invitation to the public to use the contents as a harmless and refreshing beverage. The attempt to use it caused the plaintiff the loss of his eye. Somebody is responsible, and the inference is that the defendant is the guilty party. See *Blood Balm Co. v. Cooper*, 83 Ga. 461 (10 S. E. 118, 5 L. R. A. 612, 20 Am. St. R. 324); *Watson v. Augusta Brewing Co.*, 124 Ga. 121 (52 S. E. 152, 1 L. R. A. (N. S.) 1178, 110 Am. St. R. 157); *Hudgins v. Coca-Cola Bottling Co.*, 122 Ga. 695, 699 (50 S. E. 974). In the *Monahan* case, *supra* (4 Ga. App. 680), Judge Russell, speaking for the court, held, that the doctrine underlying the maxim *res ipsa loquitur* might be applied in a case where one was injured by a falling window in the office of a tenant, and that inferentially the landlord was guilty of negligence, although the window was under the immediate control and in the actual possession of the tenant at the time.

We do not say that under the proved facts the jury must find the defendant liable, but there was enough evidence to make a *prima facie* case and to require an explanation from the defendant. We deal with the case upon the facts presented. As to whether an inference of negligence would arise against the manufacturers upon mere proof of the explosion, without more, we express no opinion.

Judgment reversed.

3917. LIVINGSTON v. MARTIN.

Under the ruling in *Luke v. Livingston*, 9 Ga. App. 116 (70 S. E. 596), the court did not err in refusing to enter judgment in favor of the plaintiff and against the defendant in this case. The expressed intention of the defendant's agreement was to let the ruling of this court "on the unilateral feature of said case, if adverse to Luke, finally determine" the case at bar. The ruling of this court in that case was not necessarily or conclusively adverse to Luke, nor did it affect his right to show either that the contract was in fact unilateral, or that it was void because it was in fact a wagering contract. In affirming the judgment overruling the demurrer, our judgment was expressly placed upon the ground that jury questions were involved, and that the lower court could not, or

demurrer, determine, as a matter of law, that the contract was unilateral, or that it was void as a gaming contract.

DECIDED MARCH 6, 1912.

Complaint: from city court of Fitzgerald—Judge Wall. December 4, 1911.

Elkins & Wall, for plaintiff.

Griffin & Griffin, A. J. McDonald, D. E. Griffin, for defendant.

RUSSELL, J. Livingston brought this suit against Martin upon a contract apparently substantially similar to that involved in *Luke v. Livingston*, 9 Ga. App. 116 (70 S. E. 596), seeking to recover damages in the sum of \$1,275, for a breach of the contract. At the May term, 1910, of the city court of Fitzgerald (about the time that the writ of error from the city court of Ocilla in *Luke v. Livingston* was filed in this court) the defendant, Martin, individually and by his counsel entered into an agreement, which was entered on the minutes of the court, of which the following are the only material portions: "Whereas the contract sued on in said *Luke* case is substantially the same in form as the one sued on in the above-stated case, it is accordingly agreed by the said defendant and his counsel that if the said Court of Appeals decides that the contract in said *Luke* case is not unilateral, and is, on account of the terms of said contract, not unenforceable, then the plaintiff in the above-stated case may at once enter judgment before the judge of this court (a jury trial being expressly waived) against the defendant for the amount sued for, except \$50. In the event that the Court of Appeals decides that said contract in said *Luke* case is not unilateral, and is not void on account of the terms of said contract, all right to further objections, grounds of demurrer, pleas, answers, and the like, both those in record and those not in record, are expressly waived, and the recitals of facts admitted as to the above-stated amount, the intention being to let the Court of Appeals ruling on the unilateral feature of said case, if adverse to Luke, finally determine the above-stated case." Upon the strength of this agreement counsel for Livingston, during the November term, 1911, of the city court of Fitzgerald, presented to the court a motion asking the rendition of a judgment in his favor against the said Martin, without the intervention of a jury, the motion stating that the plaintiff in the pending cause, under provisions of the consent made and filed by the parties in the case, and by reason of the terms of

the decision of the Court of Appeals in the case of *Luke v. Livingston*, was entitled to have judgment rendered in his favor. The judge issued a rule calling upon the defendant to show cause why the judgment should not be entered against him, and, upon a hearing thereon, overruled the motion and refused to enter judgment in behalf of the plaintiff. Livingston excepts to this judgment.

We think the court ruled correctly in denying the plaintiff's right to take a judgment. It is extremely questionable whether Martin's agreement, which we have quoted literally, is of any binding force. While every agreement between parties in court should be punctiliously observed and rigidly enforced by the courts, when it is possible to enforce it, it is difficult to discern how Martin's agreement escapes being a nudum pactum, if it escapes at all. As introductory of the material portions of the agreement which we have quoted, it is stated that it is agreed in open court "*by the defendant and his counsel*" that the instant case be not tried until the Court of Appeals decides the case of *Livingston v. Luke*, a writ of error from the city court of Ocilla; and (giving other terms of the agreement the construction now claimed by counsel for the plaintiff in error) it was agreed by the defendant that this case should abide the result of the *Luke* case. So much for the defendant's agreement. But what does the plaintiff upon his part agree to do as a consideration for the defendant's promise? There seems to be nothing, unless it is an implied agreement that the case will be delayed, and thus the defendant may gain some time. The plaintiff does not sign the agreement upon the minutes, nor is there any stipulation upon the part of the plaintiff that if the judgment of the lower court had been reversed, and this court had held that the contract upon its face was, as a matter of law, unilateral and void, he would dismiss the action and pay the costs. However, as stated above, the agreement was entered into in open court, and perhaps the implied assent of the plaintiff's counsel to the stipulation in regard to continuances might constitute such an acceptance on the plaintiff's part as would have bound him to dismiss the suit if the contract in *Luke's* case had been declared unilateral upon its face; so we will waive this point and deal with the agreement as though it was binding upon the defendant, Martin.

Even in this view of the matter, however, the decision of the

trial judge was right, because it is expressly stated that the intention of the defendant's agreement is "to let the Court of Appeals' ruling on the unilateral feature of said case, if adverse to Luke, finally determine the above-stated case." It is true that in the preceding portion of the agreement it is stated that "if the Court of Appeals decides that the contract in said *Luke* case is not unilateral, and is, on account of the terms of said contract, not unenforceable, then the plaintiff [in this case] may at once enter judgment before the judge of this court." But this agreement, like every other agreement, must be considered as a whole. Construing the agreement as a whole, the language used in the concluding portion of the agreement, that the ruling on the unilateral feature is to finally determine the case, is controlling; and this means nothing more than that the question is to be decided by a jury, if the defendant, under proper pleadings, has evidence to show that the dollar mentioned in the contract was not in fact paid to him. The reason why the agreement of the defendant in this case is not binding, and was properly held not to be so by the trial judge, is that, while this court did not hold the contract in the *Luke* case to be unilateral or unenforceable per se, we did not hold that it was not unilateral, and, on the contrary, expressly held that on a trial it might be shown to be both unilateral and void, as contrary to public policy. According to the holding in the *Luke* case, supra, the contract is prima facie not unilateral, because of the alleged payment of the sum of one dollar upon the purchase-price; and so we held that the judge could not, upon demurrer (which considers only the outward appearance of the instrument), say that it was unilateral; but this court did not hold that the contract was not unilateral, and, on the contrary, it was made the duty of the judge to declare the contract unilateral and void if it should appear to the jury, upon the trial, that the dollar mentioned in the contract was in fact never paid; for in that event Luke's contract, considered as an offer to sell, would not have been legally accepted. We expressly held that Livingston's agreement to pay damages in case he did not accept would not prevent the contract from being unilateral, and we put our judgment sustaining the overruling of the demurrer to the petition upon the fact that the statement that a dollar had been paid was, "at least prima facie, a recital of part payment of the *purchase-price*." We kept in mind that the mere fact

that an offer is based on a consideration does not prevent its being unilateral, but we concluded, upon mature consideration, that the trial judge, in passing upon the contract on demurrer, did not err in treating the statement of the contract, that "the sum of one dollar in cash has been paid on this contract by the said J. K. Livingston," as prima facie evidence of acceptance on Livingston's part; that is, as prima facie evidence that Livingston had paid to Luke a portion of the purchase-price of the cotton in order to bind the bargain.

The trial judge, in ruling upon the motion to enter up judgment against the defendant in this case, correctly apprehended the ruling of this court in the *Luke* case, as well as the import of the agreement made by the defendant in this case. The agreement and the ruling of this court are not defined within the same boundaries, nor do they cover identically the same territory. If the agreement in regard to the pending cause is mutual, it evidences that both parties expected this court, in the *Luke* case, to pass finally and conclusively upon the plaintiff's (Luke's) right of action, and to adjudge that upon the contract alone he was either entitled or not entitled to recover. Perhaps it was Luke's purpose, in filing the demurrer, to thus test the sufficiency of the contract. The demurrer may have been Luke's only means of defense. Luke may have been unable to deny Livingston's acceptance of the contract by the payment of a part of the purchase-price, or to have shown that it was mutually understood and agreed that the contract was a mere cover for a transaction in cotton futures. The ruling sustaining the judgment of the city court of Ocilla in Luke's case might, for these reasons, be conclusive in his case. This court, however, without any knowledge of or concern with the real facts of the eventual conclusion of the litigation, took the view that the trial judge was right in holding that, under the allegations of the contract, the plaintiff had a prima facie right to recover, even though it could not be said that the right was absolutely beyond explanation. On the contrary, we expressly held that the plaintiff's entire right to recover would be destroyed if it appeared either that the contract was unilateral because there had in fact been no payment made upon the contract, or because the agreement, while valid on its face, was a mere mask designed to cover an unlawful transaction in cotton futures.

The assumption of the parties in this case, as evidenced by the agreement, was that the decision of this court upon the demurrer would finally dispose of the case. On the contrary, we concluded our ruling upon the contract in the *Luke* case, supra, by saying: "Considering the contract as a whole, we are finally led to conclude that jury questions are presented, and [for that reason] that the court did not err in overruling the general demurrer to the petition." Construing fairly the agreement of the defendant in this case as a whole, it amounts only to an agreement to abide the result in the *Luke* case; and this means, as rightly held by the trial judge, that either of the defenses pointed out in the *Luke* case is available to the defendant in the present case.

Judgment affirmed.

3678. HARTWELL RAILWAY CO. v. KIDD.

1. Where goods transported over the line of more than one carrier are damaged in transit, the holder of the bill of lading may sue the delivering carrier either for the breach of its implied obligation to deliver promptly and safely, or upon its statutory liability as the last carrier which received the goods "as in good order." Where, in such a suit, there is no allegation that the carrier received the goods as in good order, the action will be construed as being one based upon the common-law liability of the carrier.
2. An action against a carrier, based upon its common-law liability for damage to goods shipped, can not by amendment be converted into a suit founded upon the statutory liability created by § 2752 of the Civil Code (1910).
3. Although, when a suit against a connecting carrier for damage to goods in transit is based upon the common-law liability of the carrier, there is a presumption that the goods were received in good order, this presumption may be rebutted; and when, in such a suit, it affirmatively appears that the goods were delivered to the plaintiff in the condition in which they were received by the carrier, a recovery is unauthorized.
4. Courts will not take judicial cognizance of the schedule of rates filed by a carrier with the interstate-commerce commission and published as required by the acts of Congress. A recovery as for an overcharge in freight upon an interstate shipment is not authorized when there is no proof of the lawful rate which the carrier is allowed to demand.
5. The evidence was not sufficient to authorize a recovery as for an overcharge for feeding the live stock which were the subject-matter of the contract of carriage.

DECIDED MARCH 19, 1912.

Action for damages; from Hart superior court—Judge Meadows. July 29, 1911.

The action was brought in a justice's court, to recover \$95.75, embracing three items of alleged damages, and was tried on appeal in the superior court. In the cause of action attached to the summons it was alleged, that 10 head of live stock were delivered at Maryville, Tenn., to a connecting carrier of the defendant, to be delivered to the plaintiff at Hartwell, Ga.; that there was unreasonable delay in delivery, caused by the negligence of the defendant; that the stock were not properly watered and fed, and were exposed to bad weather, which resulted in colds, distemper, and other diseases, and thereby reduced the market value of the stock in the sum of \$80; that the defendant collected \$10 for watering and feeding the stock, when \$5 was the proper charge; and that the collectible rate of freight on the shipment was \$59.25, and the defendant exacted \$70, an overcharge of \$10.75.

The defendant demurred, on the ground that the plaintiff had combined a suit on contract with an action ex delicto. The demurrer was overruled, and exception was duly taken to this judgment. Over objection of the defendant, the plaintiff was permitted to amend by alleging that the defendant received the stock "as in good order," and was liable under § 2752 of the Civil Code of 1910, for \$80, damages. The objection was that the amendment set forth a new cause of action; and exception was duly taken to the allowance of this amendment.

The defendant answered, that it did not feed and water the stock, and that it made no charge therefor; that it did not receive from the plaintiff any part of the freight charges, but they were paid by the shipper to the initial carrier, the Louisville & Nashville Railway Company; that the defendant did not damage the stock, but delivered the shipment to the plaintiff promptly, in the condition in which it was received from the initial carrier. By amendment the defendant pleaded a special contract made with the initial carrier, under the terms of which, as a condition precedent to the recovery of damages for injury to the stock, the plaintiff was required to give written notice to the agent of the delivering carrier, before the stock was removed from the place of shipment and mingled with other stock.

The plaintiff recovered the full amount sued for, and the defendant's motion for a new trial was overruled.

James H. Skelton, for plaintiff in error.

W. L. Hodges, contra.

POTTLER, J. 1. When goods are delivered to a carrier and direction given to ship to a designated point, the law implies a promise to transport at the lawful rate by the nearest practicable route; and this implied promise extends to every carrier who handles the shipment. Where goods transported over the line of more than one carrier are damaged in transit, the person entitled to recover the damages may sue upon the common-law liability arising upon the implied promise, or upon an express contract, if one was made, or, in this State, he may bring his action under the Civil Code (1910), § 2752, against the last carrier receiving the goods "as in good order." In the present case it is manifest that the suit as originally brought was not brought under this section of the code, there being no allegation that the defendant received the goods "as in good order." A general averment of negligence on the part of the defendant will not suffice to take the place of this essential allegation. No express contract is pleaded by the plaintiff, and it is clear that the suit is predicated upon the carrier's common-law liability. The case of *Western & Atlantic R. Co. v. Exposition Cotton Mills*, 81 Ga. 522 (2), (7 S. E. 916, 2 L. R. A. 102), is directly in point, as is also *Central Ry. Co. v. Jones*, 7 Ga. App. 165 (66 S. E. 492).

2. Where goods conveyed over the line of more than one carrier are damaged in transit, and suit is brought against the last carrier, upon the common-law liability, the defendant is presumed to have received the shipment in good order; but this presumption may be rebutted by proof that the goods were delivered to the consignee in the same condition in which they were received by the defendant. But where the suit is brought upon the statutory liability, the carrier's receipt of the goods "as in good order," without exception, is conclusive upon the carrier. *L. & N. R. Co. v. Burns*, 9 Ga. App. 241 (70 S. E. 1112), and cit.; *Southern Ry. Co. v. Waters*, 125 Ga. 520 (54 S. E. 620); *Susong v. Ry. Co.*, 115 Ga. 361 (41 S. E. 566). Under this statute the carrier is estopped to deny liability, without reference to whether it occasioned the damage, when it either actually or constructively received the goods "as in good order." This

is totally different from the common-law liability, under which the carrier is held responsible only for its own negligence. Hence it is that a suit brought against a carrier for its own negligence under its common-law liability can not, by amendment, be converted into an action to enforce the statutory liability. *Exposition Mills v. W. & A. R. Co.*, 83 Ga. 441 (10 S. E. 113); *Kavanaugh v. Southern Ry. Co.*, 120 Ga. 62, 67 (47 S. E. 526, 1 Ann. Cas. 105). The court erred in allowing the amendment.

3. As the evidence demanded a finding that the defendant promptly delivered the car to the plaintiff, and that the stock were not injured while in its possession, a verdict in the plaintiff's favor was unauthorized, so far as the sum claimed as damages for injury to the stock was concerned.

4. Carriers engaged in interstate commerce are required by the act of Congress to file with the interstate-commerce commission schedules showing all the rates and charges for transportation between different points on its own route and points on the route of any other carrier, when a through route and a joint rate have been established. These schedules are required to be posted in two conspicuous places at every point where the carrier receives passengers or freight, respectively, in such form that they can be conveniently inspected by the public. See 2 Hutch. Carr. (3d ed.) 578. The jury found in favor of the plaintiff \$10.75 for overcharge in the transportation rate. There was no evidence as to whether the initial carrier had filed and published a schedule of transportation charges, or established through routes and reasonable rates applicable thereto, as required by law. The only evidence in the record as to the lawful transportation charge is the statement of the plaintiff that the agent of the Southern Railway Company told him the rate was \$59.25, and that he had previously shipped a car over the Southern Railway from Maryville, Tennessee, to Hartwell, Georgia, at that rate. Manifestly this is no proof of the lawful rate which the carriers were entitled to collect. Without reference to whether the courts will take judicial notice of the rules and regulations of the interstate-commerce commission without proof (as to which, see *Wadley Sou. Ry. Co. v. State*, 137 Ga. 497 (73 S. E. 744), where the Supreme Court declined to take notice, without proof, of the existence or non-existence of a rule of the State railroad commission), or whether the courts know

judicially the maximum rate which a carrier is allowed to charge in a given case between points within this State, the maximum rates for intrastate shipments being prescribed and promulgated by the rules and regulations of the State commission, we can not take judicial cognizance of interstate rates and tariffs. The interstate-commerce commission does not primarily fix interstate rates. They are fixed and promulgated by the carrier, under the supervisory control of the commission, with the right, upon complaint in a given case, to require the rate to be changed. When carriers have failed voluntarily to establish joint rates and through routes, the commission has power to do so.

The rates as filed and published being conclusive on both shipper and carrier, it is no great hardship on a shipper who claims an overcharge to require him to furnish the proof to sustain his claim. We may presume that the carrier has filed and published a schedule of rates as required by law, but we do not think we are bound to know, without proof, what is the published and authorized through rate on a car of live stock from Maryville, Tennessee, to Hartwell, Georgia. The evidence shows that there was a written contract of affreightment with the initial carrier, under which it guaranteed that the total freight rate would not exceed \$70. This was the sum collected, and, in the absence of proof to the contrary, it must be assumed that the carriers did not exact more than the law permitted them to collect. We may say, in passing, that we have taken pains to refer to a copy of the published rates on file with the interstate-commerce commission, and the rate collected appears to be the same as that specified in the published tariff. If the rate charged was the rate filed and published, it of course follows that no action can be maintained in a State court to recover as for an overcharge, upon the theory that the rate is unreasonable. *Southern Ry. Co. v. Moore*, 133 Ga. 806, 818 (67 S. E. 85, 26 L. R. A. (N. S.) 851). The rate agreed upon between the initial carrier and the shipper being the rate collected, no question is presented as to the right of the connecting carrier to collect a greater rate, if the one fixed by the initial carrier was less than the maximum lawful rate. See *Goodin v. Southern Ry. Co.*, 125 Ga. 630 (6 L. R. A. (N. S.) 1054, 5 Ann. Cas. 573).

5. If the defendant exacted of the plaintiff more than the initial carrier paid for feeding and watering the live stock, or more

than a just and lawful charge for this service, the plaintiff can recover the overcharge. But the burden is on the plaintiff to prove the illegal exaction. We do not think he carried it in this case. His mere statement that he paid \$10 and should not have been charged but \$5 will not suffice. He must offer sufficient data to enable the jury to reach a correct conclusion. He does not show how many times the stock were fed, or what was paid by the carrier, or what should have been paid. It does not clearly appear that the charge for feeding was in fact paid to the defendant. The evidence was not sufficient to authorize a recovery of the item for overcharge in feeding. The effect of the act of Congress known as the "Hepburn law," upon the special contract of affreightment made with the initial carrier, and the extent to which such a contract is binding upon the defendant as connecting carrier, are questions with which we do not find it necessary to deal. The demurrer was not only too general, but was without merit.

Judgment reversed.

3781. SHAW v. THE STATE.

- RUSSELL, J. 1. In an indictment for burglary, embracing larceny from the house, the description of the stolen property as being "thirty-five pounds of middling meat, of the value of seven & 50/100 dollars, the property of said Len Porter," was sufficient, and there was no error in overruling the demurrer, based on the ground that the description was not sufficiently definite.
2. The evidence introduced by the defendant did not render the defendant's presence at the scene of the larceny impossible; and, in the absence of a request to that effect, the judge did not err in omitting to instruct the jury upon the law of alibi.

Judgment affirmed. Pottle, J., not presiding.

DECIDED MARCH 19, 1912.

Indictment for burglary; from Taliaferro superior court—Judge Walker. September 29, 1911.

J. A. Beazley, for plaintiff in error.

Thomas J. Brown, solicitor-general, contra.

3788. GANEY v. THE STATE.

RUSSELL, J. The evidence was insufficient to authorize the conviction. The corpus delicti was not established beyond a reasonable doubt. It appears, from the evidence, that the defendant has never refused to pay for the ax handle. His employer, a witness for the State, knew he was going for the ax handle and was going to get it from the prosecutor, and consented to his going for it. It further appears that the ax handle was purchased for the benefit of the defendant's employer, who owned the ax in which the handle was put, and is solvent and willing to pay the fair market value for the ax handle, but that the prosecutor has never asked him to pay him for it. Even if the evidence of the defendant's intent to defraud were plain, there is no evidence of loss on the part of the prosecutor, and the conviction of the defendant of cheating and swindling, under section 719 of the Penal Code (1910), was unauthorized. See *McGee v. State*, 97 Ga. 199 (22 S. E. 589); *Berry v. State*, 97 Ga. 202 (23 S. E. 833); *Drought v. State*, 101 Ga. 544 (28 S. E. 1013); *Busby v. State*, 120 Ga. 858 (48 S. E. 314). It is essential to the legality of a conviction under that section of the Penal Code that the person alleged to have been defrauded and cheated shall have sustained some pecuniary loss.

Judgment reversed. Pottle, J., not presiding.

DECIDED MARCH 19, 1912.

Accusation of cheating and swindling; from city court of Dublin—Judge Hawkins. September 23, 1911.

R. Earl Camp, for plaintiff in error.

George B. Davis, solicitor, *J. B. Green*, contra.

3794. ECTOR v. THE STATE.

In no criminal case in Georgia in which the accused is a wife is the testimony of her husband admissible against her, whether the testimony sought from him be direct or circumstantial.

DECIDED MARCH 19, 1912.

Conviction of stabbing; from city court of Griffin—Judge Flynt. October 7, 1911.

T. W. Thurman, for plaintiff in error.

W. H. Beck, solicitor, contra.

RUSSELL, J. The only question in this case is whether the husband is a competent witness upon the trial of his wife for the commission of a crime. The trial judge permitted the husband to testify against his wife; and in fact he was the only witness who gave

any direct testimony. The wife was charged with stabbing the husband, and the husband swore out the warrant upon which the accusation was based, and also testified to the fact that his wife was the person who cut him. Under the provisions of the Penal Code (1910), § 1037, paragraph 4, the question is not a debatable one. A husband is not a competent witness against his wife upon her trial for crime. In no criminal case in Georgia in which the accused is a wife can the defendant's husband testify against her, it matters not whether the testimony sought to be elicited from him be direct or circumstantial. The wife can, if she chooses, testify against her husband in any case where the charge involves a crime against her person, but the reverse of the proposition is not true. Under the provisions of the code section to which we have referred above, the husband is neither competent nor compellable to give evidence against his wife in any criminal proceeding, though the wife is competent (but not compellable) to testify against her husband upon his trial for "any criminal offense committed, or attempted to have been committed, upon her person," as well as "a competent witness to testify for or against her husband in cases of abandonment of his child." As to husband and wife, with regard to the capacity of each as a witness with reference to the marriage relation, the case stands thus: The wife can not testify *for* her husband upon his trial for any criminal charge, except that of abandonment. She can not testify *against* him, unless the offense was committed or sought to be committed upon her own person; and in those cases where she is competent as a witness she is not to be compelled to testify if she prefers to remain silent. But the law shuts the husband's mouth, whether he wishes to speak or not, in every case where his wife is charged with crime; and it makes no exception, even if the crime is charged to have been committed upon his person.

There was a time when the rule in Georgia was different. In the Code of 1860, § 3782, which was adopted by an act of the General Assembly approved June 19, 1860, it was declared that "Husband and wife, lawfully married, can not be witnesses for or against each other, nor can the wife be a witness for a third person, where her testimony may indirectly affect her husband. The objection exists after the dissolution of the marriage, by death or otherwise, as to all knowledge acquired by either party by reason of the marriage

relation. An exception to this general rule exists in all criminal or quasi-criminal proceedings against either party for offenses upon the person of the other." It will be seen that under this provision of the code, while both husband and wife were generally incompetent where the rights of either party in a criminal case were concerned, and the wife was wholly disqualified as a witness in a civil case if the rights of her husband were even indirectly affected, still, by express exception, where the offense was one charged to have been committed by either of the married pair upon the person of the other, the opposite party could testify. It is evident that this exception which gave the husband the right to testify against his wife was purposely stricken, and that the withdrawal from the codes of 1867, 1873, 1882, and 1895, as well as from the present code of that provision of the code of 1860 which permitted a husband to testify in a case where his wife had assaulted him, was not a matter of chance or oversight, but was the result of a deliberate design to change the previous law and our public policy upon the subject. The history of the evolution of our present law on this subject is somewhat interesting. That the privilege of husband to testify against his wife was not unintentionally excluded from our law is apparent in the passage of the act approved December 15, 1866, and known as "the evidence act" of that year. (Acts 1866, p. 138.) In the second section of that act it was declared that "Nothing herein contained shall, in any criminal proceeding, render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." This statute of itself repealed the code section to which we have referred, and this legislation was codified as the fourth subdivision of § 3798 of the Code of 1867, and in the same form is found as the fourth subdivision of § 3854 of the Code of 1873, in which it is declared that "No husband shall be competent or compellable to give evidence for or against his wife in any criminal proceeding, nor shall any wife, in any criminal proceeding, be competent or compellable to give evidence for or against her husband." The same language appears in the codes of 1882 and 1895. But in 1880 the legislature passed an act (Acts 1880-1, p. 121) providing that the wife should be competent, but not compellable, to testify against her husband upon his trial for "any criminal offense

committed, or attempted to have been committed, upon her person;" and in the Code of 1882 this exception in behalf of the wife was inserted as the concluding portion of the subdivision of § 3854 which provides that "No husband shall be competent or compellable to give evidence for or against his wife in any criminal proceeding, nor shall any wife, in any criminal proceeding, be competent or compellable to give evidence for or against her husband. But the wife shall be competent, but not compellable, to testify against her husband, upon his trial for any criminal offense committed, or attempted to have been committed, upon the person of the wife."

In the Penal Code of 1895, § 1011, par. 4, it is declared that "Husband and wife shall not be competent or compellable to give evidence in any criminal proceeding for or against each other, except that the wife shall be competent, but not compellable, to testify against her husband, upon his trial for any criminal offense committed, or attempted to have been committed, upon her person. She is also a competent witness, to testify for or against her husband in cases of abandonment of his child, as provided for in section 114 of this Code."

With the exception of this addition taken from the act of 1880, and the provision allowing a wife to testify against her husband in cases of abandonment, the language of § 1037 of the Code of 1910 varies but little from the verbiage used in the original section (3798) of the Code of 1867, without the exception which the Code of 1867 contained in favor of the admissibility of the husband. In the meantime, in 1865, a statute was passed (Acts of 1865-66, p. 233) which made the wife a competent witness in cases of wife-beating. It will thus be seen that in the evolution of the rule of evidence which we are now considering, various statutes have been passed extending the competency of the wife as a witness, but no such privilege has been given to the husband. If it is not to be considered as evidence of our innate spirit of chivalry toward woman, or of our greater confidence in her freedom from influence, it is still a manifestation of a partiality in behalf of the wife which is not without reason. The legislature, no doubt, in restoring the provision which made the wife a competent witness in all cases where her husband was her assailant, had in mind that there were instances where wives could in no other way be protected from the ferocity of brutal husbands, and that the abuse of the privilege

would be prevented by the fact that, though the wife is competent, she is not compellable to testify against her husband. On the other hand, we think it plain that in not restoring the competency of the husband as to offenses committed upon his person by his wife, the legislature perhaps had in mind the fact that attacks upon husbands by wives were very rare, and that even if they sometimes occurred, the right to testify on the part of the husband might in some cases be abused, and used as a means of getting rid of a wife of whom the husband had tired. As the conviction in this case depends solely upon the testimony of the husband, and the State's counsel frankly admits in his brief that if the testimony of the husband is illegal and inadmissible, the conviction can not be supported, we conclude that the judgment finding the defendant guilty is unauthorized, and the trial judge erred in refusing a new trial. *Judgment reversed. Pottle, J., not presiding.*

3845. HOLCOMB v. MASHBURN.

Where one interested in a business conducted by a corporation agreed orally with a creditor of the corporation, in consideration of a loan made to the promisor, to be used in the business, that he would see the debt of the corporation paid, and would likewise see that all future obligations of the corporation to the creditor were discharged, the agreement was not void under the statute of frauds, and the promisor was liable to the creditor both for the amount of the past-due indebtedness and for the value of goods afterwards sold the corporation upon the faith of his promise.

DECIDED MARCH 19, 1912.

Appeal; from Fulton superior court—Judge Pendleton. September 22, 1911.

Moore & Pomeroy, for plaintiff in error.

J. E. & L. F. McClelland, contra.

POTTLE, J. Mashburn sued Holcomb on a promissory note. The defendant admitted the execution of the note, but pleaded that Mashburn was indebted to him on an account in a sum larger than the note sued on. At the conclusion of the evidence the judge directed a verdict in favor of the plaintiff, and this is the error assigned.

It appears, from the evidence, that Mashburn was manager for,

and largely interested in, a corporation by the name of the Southern Soda Water Company. Holcomb was a member of the firm of Marshall & Holcomb, which had been selling to the corporation lithia water, and the corporation had become indebted to the partnership in the sum of \$450. While this indebtedness was in existence Mashburn applied to the firm for a loan of \$500, to be used in the business of the Southern Soda Water Company. As to the agreement between Mashburn and the partnership, in reference to this loan, the defendant testified: "Whereupon he stated that if Marshall & Holcomb would make the loan to him as originally agreed, he would not only pay it back on a certain day, but would give the firm a check for the account of \$250 which they had on the books against the Southern Soda Water Company, and he would personally see that every dollar they sold them in the future would be paid. Whereupon I made the loan." Further the defendant testified that Mashburn said to him: "You continue to sell, you make this loan, and I'll pay this back" (on a certain day some nine or ten days ahead), "and at the same time I'll pay you \$250 on account—pay the firm of Marshall & Holcomb \$250 on account—and I'll see that they get every cent the Southern Soda Water Company owes them, and every cent they become obligated to you for in the future. I'll see that you get your money." Again, on cross-examination Holcomb testified that at the time of the conversation between him and Mashburn took place, the words used by Mashburn were that "he would personally see that the account was paid." It appeared that shortly after this conversation took place, the firm of Marshall & Holcomb loaned Mashburn \$500, and continued to sell and deliver lithia water to the Southern Soda Water Company, at its place of business in Atlanta, and that an admitted indebtedness of \$317.14 arose. Before suit was instituted the firm of Marshall & Holcomb transferred to Holcomb in writing the account which they claimed against Mashburn. It appears that the defendant's firm delivered at the company's place of business coupon books containing tickets, and that the lithia water was delivered in exchange for these tickets. The books were receipted for by clerks from time to time as they were delivered. The presiding judge directed a verdict in favor of the plaintiff, upon the theory that the contract relied on by the defendant was void under the fourth section of the statute of frauds, being

a "promise to answer for the debt, default, or miscarriage of another." Civil Code (1910), § 3222.

There is no testimony that the defendant's firm expressly released the Southern Soda Water Company from the indebtedness which it owed at the time of the agreement with Mashburn. It is very clear, however, from the testimony of Holcomb, that the agreement with Mashburn was that a loan of \$500 would be made to him, provided he would pay or see paid the old account due by the company of which he was manager, and that this loan was actually made in pursuance of this agreement. This being so, there was such performance on one side and acceptance by the other as to take the agreement out of the statute of frauds and to bring it within the exception stated in the Civil Code (1910), § 3223. The same rule would apply to the future sales, but, in addition to this, the contract as testified to by Holcomb was an original, and not a collateral, undertaking on the part of Mashburn. See *Maddox v. Pierce*, 74 Ga. 838; *Sext v. Geise*, 80 Ga. 698 (6 S. E. 174); *Ferst's Sons v. Bank of Waycross*, 111 Ga. 229 (36 S. E. 773); *Evans v. Griffin*, 1 Ga. App. 327 (57 S. E. 921). One test is whether the original debtor is still held liable, but this is not the only test; because, if the undertaking be a joint one on the part of the original debtor and the new promisor, the undertaking of the latter would still be an original promise, and not a collateral agreement to become security for the original debt. *Cruse v. Foster*, 76 Ga. 723. The fact that the coupon books were receipted for in the name of the corporation by one of its clerks might be a circumstance to determine whether the creditor still looked to the corporation for payment, but it is by no means conclusive on the question, and is subject to explanation. The financial condition of the Southern Soda Water Company, and Mashburn's interest in the company, at the time the defendant claims he made the agreement with Mashburn, are proper subject-matter of inquiry, as circumstances tending to explain why Mashburn might have made the agreement testified to by the defendant.

Judgment reversed.

3872. MOSS, executor, v. ANDERSON.

A motion by a defendant to set aside a verdict and judgment against him was properly overruled, when it appeared that the defense relied on by the movant was contained in a proposed amendment to the answer, a copy of which was exhibited with the motion, and the original answer did not contain enough to amend by. If in such a case the motion should be granted, the amendment would not be allowable, and the court would be compelled to strike the original answer and again enter up verdict and judgment in the plaintiff's favor.

DECIDED MARCH 19, 1912.

Motion to set aside judgment; from city court of Atlanta—Judge Reid. October 21, 1911.

H. B. Moss, Moore & Branch, for plaintiff in error.

John Awtrey, George F. Gober, contra.

POTTLE, J. S. A. Anderson brought suit on a promissory note against H. B. Moss and T. J. Moss as executors of the will of A. Y. Moss. Verdict and judgment were rendered in the plaintiff's favor. During the term T. J. Moss filed a motion to set aside the verdict and judgment against him, upon the ground that a consent agreement had been entered into by the attorneys for both parties, under the terms of which the case should not have been called for trial at the term at which the verdict was rendered, and at which time the attorney for the executors was absent. The trial judge overruled the motion, and this is the error assigned.

The truth of the statement of facts in the motion is vigorously contested by the adversary counsel. Much was said in the argument in reference to the power of the judge to entertain the motion, and as to whether sufficient facts were set forth to authorize the court to grant the relief prayed for, but we do not find it necessary to discuss these questions. The petition alleged that the note sued on was executed by A. Y. Moss to the defendant H. B. Moss, and indorsed by the latter over to the plaintiff. There was a demurrer to the petition, on the ground that, the plaintiff having waited seventeen years to bring the action, his claim should be disallowed, as a stale demand. The answer admitted that the defendant T. J. Moss was executor as alleged, and averred that he was unable to admit or deny whether A. Y. Moss had turned over the note sued on to H. B. Moss, or whether the defendants were indebted to the plaintiff as alleged in the petition. The only other

paragraph in the answer was as follows: "Further answering plaintiff's petition, from the best information that defendant can obtain, plaintiff is not entitled to recover of defendant as executor any amount whatever."

It needs no argument to show that this answer utterly fails to set forth any defense whatever to the action. The motion to set aside the verdict and judgment averred that the defendant executor, since the filing of his original answer, had learned facts which made a valid defense to the suit; and a proposed amendment to the answer was exhibited with the motion. It is not at all certain that this amendment set forth a good defense, but even if it did, there was nothing in the original answer to amend by, and for this reason the amendment should not have been allowed. *Smith v. First Natl. Bank*, 115 Ga. 608 (41 S. E. 983). This being true, even if the defendant's motion had been granted and the verdict and judgment set aside and the case reinstated, it could not have availed him. The case would have stood just as it did before the verdict and judgment were entered. There was nothing on which an amendment setting forth a valid defense to the action could have been predicated, and the court would have been obliged to disallow the amendment, strike the original answer, and enter up verdict and judgment against the defendants, as if the case had been in default. The note was under seal, and the suit was brought within the statutory limitation period. There was, therefore, no merit in the demurrer. For these reasons, without reference to other questions made in the record, the court did not err in refusing to grant the motion. A motion was made by the defendant in error to award damages, but we do not think, under all the facts and circumstances, that the appeal is so frivolous as to justify the granting of such motion.

Judgment affirmed.

3920. MAPLES (Gurly) v. THE STATE.

3921. MAPLES (Gary) v. THE STATE.

3922. CATO v. THE STATE.

3923. TABB v. THE STATE.

3924. STANTON v. THE STATE.

POTTER, J. This court is without jurisdiction of a bill of exceptions complaining solely of the refusal of the trial judge to permit a demand for trial in a criminal case to be entered upon the minutes. *Sharpe v. State*, ante, 212 (73 S. E. 33). Upon motion of the plaintiffs in error, direction is given that the copy bill of exceptions in each of the foregoing cases, which has been filed in the office of the clerk of the trial court, may operate as exceptions pendente lite.

Writs of error dismissed, with direction.

DECIDED MARCH 19, 1912.

Motions to dismiss writ of error.

W. I. Geer, for plaintiffs in error.

J. A. Lang, solicitor-general, *R. R. Arnold*, contra.

3925. BENN v. THE STATE.

POTTER, J. The evidence fully supports the verdict, and no error of law is complained of.

Judgment affirmed.

DECIDED MARCH 19, 1912.

Accusation of sale of liquor; from city court of Madison—Judge Anderson. November 27, 1911.

Percy Middlebrooks, for plaintiff in error.

A. G. Foster, solicitor, contra.

3931. LAWRENCE v. THE STATE.

1. An indictment under § 162 of the Penal Code (1910), charging the offense of felony, in that the accused did on a certain day mark and brand the animal described in the indictment, in the manner therein set forth and "by then and there altering and changing the mark" on said animal, is not subject to demurrer, either on the ground that it sets forth two separate, distinct felonies in one count, or that it fails to describe how and in what manner the animal was marked or branded before the mark was changed, or how and in what manner the mark was changed. But one offense is charged in the indictment, to

- wit, the marking and branding of the animal, the other allegations referring simply to concurrent acts relating to the transaction previously described in the indictment.
2. It is not necessary, to support a conviction under such an indictment, that it should appear that at the time the criminal act was committed the accused knew who was the owner of the animal. As to this matter it is sufficient if it appear that the animal was not the property of the accused and that he marked or branded it in the manner described in the indictment, with an intention to appropriate it to his own use, or to prevent identification by the true owner.
 3. It is erroneous to charge the jury that they "may believe that witness who has the best means of knowing the facts about which he testifies and the least inducement to swear falsely," without adding the qualification that the witnesses should be of equal credibility. An instruction of the nature just indicated will, under the facts of the present case, require the granting of a new trial.

DECIDED MARCH 19, 1912.

Indictment for misdemeanor; from Catoosa superior court—Judge Fite. November 24, 1911.

The indictment charged that J. L. Lawrence "did . . . unlawfully and feloniously mark" a certain red steer, the property of J. B. Beaver, "by cutting off a part of the left ear of said steer, and by branding on the left hip of said steer a letter 'L,' and by then and there altering and changing the mark on said steer with the intention to claim and appropriate said steer to his, the said J. L. Lawrence's, own use and to prevent identification by the said owner of said steer." The accused moved to quash the indictment, on the grounds that it charged two separate and distinct offenses in one count, and failed to allege how the steer was marked or branded before the alteration was made, or how or in what manner the accused changed the mark on the steer. Exception was taken to the overruling of this motion, as well as to the refusal of a new trial.

J. E. Rosser, Maddox, McCamy & Shumate, for plaintiff in error.
T. C. Milner, solicitor-general, George W. Stevens, contra.

POTTLE, J. 1. We agree that § 162 of the Penal Code (1910) defines two distinct offenses; one the marking or branding of the animal, and the other the altering or changing the mark or brand. We also agree that two separate and distinct offenses can not be joined in one count in the same indictment, where the objection is raised on arraignment by motion to quash or special demurrer to the indictment. 1 Bishop, Criminal Procedure, § 432. But we

do not think the indictment in the present case charges two offenses. The offense described in the indictment is that of marking and branding the steer in the manner therein described. The allegation in reference to altering and changing the mark is mere matter of inducement, descriptive of the manner in which the main offense charged in the indictment was consummated. If the indictment had used the disjunctive "or," instead of the conjunctive "and," it would, of course, have been subject to demurrer; because in that case it would have described two separate and distinct offenses, and it could not have been known with which offense the accused stood charged. *Haley v. State*, 124 Ga. 216 (52 S. E. 159). The test is whether or not the acts described in the indictment relate to but one transaction. If they do, it is well settled that offenses, though not of the same nature, but blended together by concurrent acts, may be joined in one count. *Mitchell v. State*, 6 Ga. App. 554 (65 S. E. 326); *Lepinsky v. State*, 7 Ga. App. 285 (66 S. E. 965); *Hall v. State*, 8 Ga. App. 747 (70 S. E. 211). It is clear that the present indictment relates only to one transaction, and that the averment in reference to altering and changing the mark is simply an allegation of an act which concurred with the act of branding and was a part of that transaction. So construing the indictment, it was not subject to the first ground of the demurrer. *Thomas v. State*, 59 Ga. 784; *Heath v. State*, 91 Ga. 126 (16 S. E. 657); *Hale v. State*, 120 Ga. 184 (47 S. E. 531). Under the construction which we have placed upon the indictment, it was not material that the accused should have been specifically informed as to how the steer was marked or branded before the mark was changed, nor as to the exact manner in which the mark was changed. The offense charged was that of marking and branding, or marking or branding, and this offense is made out when it appears that the accused either marked or branded the steer in the manner described in the indictment. Its previous condition as to marks and brands is not material.

2. In the indictment the steer alleged to have been marked was described as the property of J. B. Beaver; and the evidence warranted a finding that this allegation was true. The court charged the jury, in substance, that if the accused marked the steer, and did it for the purpose of appropriating it to his own use and preventing the owner from identifying it, it would be immaterial whether

at the time the marking was done the accused knew who was the owner of the steer. This is assigned as error. We see no error in this instruction. The indictment did not allege that the accused knew the steer was the property of J. B. Beaver, and it was not necessary that such an allegation should be made. It is not at all certain that it was necessary to allege who owned the steer, but, having alleged it, it was necessary to prove it, and this the State did. The gist of the offense is marking or branding an animal not the property of the person marking it, with the intention of claiming or appropriating it to his own use, or of preventing identification by the true owner, whoever he may be. To make out the offense, it is not necessary to prove that the accused knew who the owner was. It is sufficient if it be shown that the animal was not the property of the accused and that he marked it or branded it for the purpose either of appropriating it to his own use or of preventing identification by its owner.

3. One of the grounds of the motion for a new trial is that the court erred in charging the jury as follows: "In determining the weight you will give the evidence of the witnesses, take their manner of testifying, their interest or want of interest in the case, their feeling, prejudice, bias, relationship to the parties and to the case, or anything of that kind that may appear from the evidence, and you may believe that witness who has the best means of knowing the facts about which he testifies and the least inducement to swear falsely, and under these rules determine what the truth of the evidence is." In the case of *L. & N. R. Co. v. Rogers*, 136 Ga. 674 (71 S. E. 1102), a new trial was granted on account of an instruction in almost identically the language above set forth. It was held to be error to instruct the jury that they might believe that witness, or those witnesses, who had had the best means of knowing the facts to which they testified, and the least inducement to swear falsely, without the qualification that the witnesses be of equal credibility. Quoting from a former opinion of Mr. Chief Justice Simmons, the Supreme Court said: "Such a witness may for other reasons be entirely unworthy of belief; and certainly it would not then be the duty of the jury to believe him." In the present case the alleged owner of the animal, J. B. Beaver, testified positively as to his ownership. There were several witnesses for the defendant under whose testimony the jury might have found that the animal

which the accused marked did not belong to Beaver, but was an animal which the accused had bought from another person. This being so, under the ruling of the Supreme Court in the case above referred to, the erroneous instruction above quoted required the granting of a new trial. *Judgment reversed.*

3937. CAMPBELL v. THE STATE.

The evidence strongly supports the verdict, and the alleged newly discovered testimony would not probably change the result on a second trial.

DECIDED MARCH 19, 1912.

Accusation of sale of liquor; from city court of Houston county—Judge Brunson. December 4, 1911.

M. Kunz, for plaintiff in error.

R. E. Brown, solicitor, contra.

HILL, C. J. The plaintiff in error was convicted of selling whisky in Houston county. The evidence for the State strongly supports the verdict. She asks for a new trial on the ground of newly discovered testimony, to wit, that her residence, where the State's witnesses testified that they bought whisky from her on divers occasions during the year 1911, was in Dooly county, and not in Houston county. On the trial three witnesses swore positively that her residence was in Houston county, and she made no question of jurisdiction. In support of this ground of her motion she presented the affidavit of one witness, who swore that the accused lived in Dooly county at the time of the commission of the offense. She also offered to prove by a deed to certain land in Dooly county that the place where she lived was in Dooly county. She claimed that her home was on the land conveyed by this deed; but in the description of the land conveyed there is nothing to show that it included her home. The State, in a counter-showing, presented the affidavits of three men, who swore that they were familiar with the location of the home of the accused, and had known it for thirty-five or forty years, and that it was in Houston county. The alleged newly discovered evidence would not probably change the result on a second trial. It is unreasonable that one can live for many years in one place without knowing the county

in which he or she has resided for so long a time. There was no error in refusing to grant a new trial on this ground. Certainly the slightest diligence, either by the accused or her counsel, would have discovered the fact.

Judgment affirmed.

3938. ROBINSON *v.* THE STATE.

RUSSELL, J. The ruling in this case is controlled by the decisions in *Fountain v. Fountain*, 7 Ga. App. 361 (66 S. E. 1020), and *Parks v. Simpson*, 124 Ga. 523 (52 S. E. 616). A landlord has no lien for supplies furnished for a year prior to that in which the crop was raised. For that reason, where it appears that the tenant has paid his rent, in full and also that he has delivered to the landlord money and produce enough to pay for the supplies advanced to him in making the crop for the particular year in question, he is not subject to be convicted of a violation of sections 720 and 721 of the Penal Code (1910).

Judgment reversed.

DECIDED MARCH 19, 1912.

Accusation of sale of property to defraud lienholder; from city court of Wrightsville—Judge Kent. December 19, 1911.

E. L. Stephens, for plaintiff in error.

B. B. Blount, solicitor, *Alfred Herrington, Hines & Jordan*, contra.

3939. ENGLISH *v.* THE STATE.

POTTLE, J. One who, while inside of an occupied dwelling, shoots a pistol at a floor thereof is guilty of shooting "at" or "into" the dwelling, within the meaning of the act approved August 13, 1910 (Acts 1910, p. 137). 1 Words and Phrases, 596; *Blackwell v. State*, 30 Tex. App. 596 (17 S. W. 1061).

Judgment affirmed.

DECIDED MARCH 19, 1912.

Indictment for misdemeanor; from Brooks superior court—Judge Thomas. December 16, 1911.

Grover C. Edmondson, for plaintiff in error.

John A. Wilkes, solicitor-general, contra.

3940. KEENAN v. THE STATE.

1. The words "place of business," as used in the statute defining burglary, mean any house, other than a "dwelling, mansion, or storehouse," occupied as a place of business, in which valuable goods are contained. The allegations of the indictment were sufficient to show that the "place of business" alleged to have been broken into and entered with intent to commit a larceny was a house, and that valuable goods were contained therein.
2. If the words "place of business," with the context, were insufficient to show that "the place of business" was a house, it was a formal defect, to be reached by special demurrer, and was cured by the verdict.

DECIDED MARCH 19, 1912.

Indictment for burglary; from Chatham superior court—Judge Charlton. December 28, 1911.

Shelby Myrick, for plaintiff in error.

Walter C. Hartridge, solicitor-general, *Morris H. Bernstein*, contra.

HILL, C. J. The plaintiff in error was convicted of burglary, and made a motion in arrest of judgment, which was overruled, and he excepted. The first count of the indictment (omitting formal parts) charges that Fred Keenan "the place of business of one William G. Austin, doing business as the Savannah Motor Car Company, where valuable goods and wares are stored, did feloniously and burglariously break and enter, with the intent then and there to commit a larceny therein." The second count repeats the language of the first count (except the concluding clause, as to the intent to commit a larceny), and adds the following words: "and, after so breaking and entering, twelve automobile tires of the value of \$400, the property of one William G. Austin, doing business as the Savannah Motor Car Company, and twelve inner tubes of the value of \$75, the property of one William G. Austin, doing business as the Savannah Motor Car Company, being found therein, did then and there wrongfully and fraudulently and privately take and carry away, with the intent to steal the same." The motion in arrest of judgment is based upon three grounds: (1) that neither of the counts of the indictment alleges that valuable goods and wares were stored in the place of business at the date of the alleged offense; (2) that neither of the counts alleges the character of the place of business in such way as to show that the place of business was the subject of burglary, under the laws of this State; and

(3) that neither of the counts alleges that the place of business set out in the indictment was a storehouse, building, or house of any kind, or was such premises as could be the subject of burglary under the laws of this State.

1. The first objection is fully met by the allegations of the indictment. The first count charges that the place of business broken and entered with intent to commit a larceny was the place of business of a designated person, "where valuable goods and wares are stored." The second count repeats these allegations, and alleges further, that after breaking and entering this place of business, the accused did take therefrom described personal property. It is difficult to understand how goods and wares can be taken from a place of business without having been stored or contained therein. The allegations on this point were clear, distinct, certain, and definite, and we fail to see how they could have been made more specific.

2. The second and third objections to the allegations of the indictment are based upon the ground that it does not specifically appear that the place of business set out in the indictment was a storehouse or building of any kind, or that it was such premises as could be the subject of burglary under the laws of Georgia. Section 146 of the Penal Code (1910) defines burglary as follows: "Burglary is the breaking and entering into the dwelling, mansion, or storehouse, or other place of business of another, where valuable goods, wares, produce, or any other article of value are contained or stored, with intent to commit a felony or larceny." This statute enlarges the common-law definition of burglary; for burglary at common law was the breaking and entering a mansion or dwelling-house with intent to commit a felony or larceny therein. This section of the code includes not only a dwelling-house or mansion, but any storehouse or other place of business where valuable goods of any character are contained or stored. The words "other place of business," considered with the context, clearly mean a house used as a place of business, but are not intended to be restricted to a house used as a storehouse or of the nature of a storehouse. They include any house used as a place of business by another, where valuable goods are contained, whether it be a storehouse or not. The language of the indictment clearly charges that the place of business was a house where valuable property was stored or contained. The allegations are that the place of business was broken

into and entered, and certain described property taken therefrom. The indictment states the offense in the terms and language of the code, and so plainly that the nature of the offense charged could have been easily understood by the jury. Penal Code (1910), § 954. Indeed, no other inference could be drawn from the allegations, considered as a whole, than that the place of business that was burglarized was a house where valuable goods were contained. *Bethune v. State*, 48 Ga. 505. If, however, the allegation of the indictment as to the character of the place of business was not sufficiently specific, it was merely a formal defect and subject to special demurrer, was not good in arrest of judgment, and was cured by the verdict. We think that the objections urged to the indictment were without merit, either in form or substance, and that the motion in arrest of judgment was properly overruled.

Judgment affirmed.

3941. WATSON v. THE STATE.

RUSSELL, J. The evidence did not authorize the conviction of the defendant. Mere proof of general reputation to that effect will not authorize the conviction of one accused of the offense of keeping a lewd house. The decision in this case is controlled by the rulings of this court in *Jones v. State*, 2 Ga. App. 433 (58 S. E. 559), and *Coleman v. State*, 5 Ga. App. 366 (63 S. E. 244). The court erred in refusing a new trial.

Judgment reversed.

DECIDED MARCH 19, 1912.

Accusation of keeping lewd house; from city court of Savannah—
Judge Davis Freeman. December 21, 1911.

Shelby Myrick, J. H. Kinckle, for plaintiff in error.

Walter C. Hartridge, solicitor-general, Morris H. Bernstein,
contra.

3942. KENNEDY v. THE STATE.

POTTLE, J. The accused having been indicted for the offense of assault and battery, and the evidence demanding a finding that if any offense at all was committed, it was that of an unlawful battery, there could be no conviction of simple assault. Penal Code (1910), § 19; *Kelsey v.*

State, 62 Ga. 558; *Harris v. State*, 101 Ga. 530 (29 S. E. 423); *Welborn v. State*, *Giles v. State*, 116 Ga. 522 (42 S. E. 773).

Judgment reversed.

DECIDED MARCH 19, 1912.

Accusation of assault and battery; from city court of Reidsville—Judge Collins. November 28, 1911.

Way & Burkhalter, for plaintiff in error.

3947. CAMPBELL *v.* THE STATE.

RUSSELL, J. 1. The evidence in behalf of the State authorized the jury to infer that the assault was made by the defendant, and that, while it was not his purpose to use force or to have sexual intercourse with the female against her will, she did not consent to or encourage the advances made by him.

2. There is no merit in the other assignments of error, and it was not error to refuse a new trial.

Judgment affirmed.

DECIDED MARCH 19, 1912.

Indictment for assault with intent to rape—conviction of assault and battery; from Colquitt superior court—December 29, 1911.

W. A. Covington, T. H. Parker, for plaintiff in error.

J. A. Wilkes, solicitor-general, contra.

3948. MARTIN *v.* THE STATE.

1. Where there are good and bad counts in an indictment, the court may strike the bad counts without quashing the whole indictment.

2. Where one on trial for larceny is shown to have recently been in possession of the property described in the indictment, and it further appears that the same had been stolen, it is permissible for the State to prove that at the place where, and the time when, the stolen goods were found, there were found numerous other articles of the same kind which had likewise been stolen. RUSSELL, J., dissents.

3. The requests to charge, so far as legal and pertinent, were fully covered by the general charge, which fairly presented the issues involved. The evidence fully supports the verdict, and there is no error in the record.

DECIDED MARCH 19, 1912.

Conviction of larceny; from city court of Floyd county—Judge Reece. December 21, 1911.

Eubanks & Mebane, for plaintiff in error.

John W. Bale, solicitor-general, Moses Wright, A. W. Shanklin, contra.

POTTLE, J. The accused was arraigned under an indictment containing two counts, one charging the larceny of certain described buggy and wagon harness, and the other alleging that he had received the harness, knowing it to have been stolen. The accused demurred, upon the ground that the indictment charged two separate and distinct offenses and failed to allege either that the accused had received the property in the county in which the indictment was found, or that he had carried the harness into that county after receiving it elsewhere. The court sustained the demurrer to the count for receiving stolen property, and ruled the accused to trial on the count charging the larceny. After conviction he filed a motion for a new trial, which was overruled, and he excepted, assigning error upon this judgment and upon the court's refusal to quash the whole indictment.

1. The point is made that a defective count renders the whole indictment bad, and that the demurrer should have been sustained generally. The joinder of the two counts was not cause for quashing the indictment. *Johnson v. State*, 61 Ga. 213. In the English case of *Rex v. Pewtress*, 2 Stra. 1026, an indictment charged one assault, in twenty-one counts, and Lord Hardwicke declined to quash a part of them without quashing the whole indictment. Mr. Bishop, in his *New Criminal Procedure* (vol. 1, § 764), points out that many of the English cases, giving too wide a scope to this decision, hold that the court can not quash a defective count and leave a good one to stand, but the whole must be quashed or none, but that the later English doctrine permits the striking out of any number of counts less than all. In this country the decisions are in conflict. See cases cited by Bishop. In *Sutton v. State*, 122 Ga. 158 (50 S. E. 60), it was held that when an indictment contains two counts, one bad and the other good, a general demurrer to the whole indictment will not be sustained. It is familiar practice in this State for the court to require the prosecuting attorney to elect upon which count he will proceed. Often the accused has the right to compel an election, the practical effect of which is the entering of a *nolle prosequi* as to all the counts save the one relied upon for a conviction. Each count contains a separate and distinct

charge. It is an indictment within an indictment, and we know of no reason why, when there are two counts, one good and one bad, the bad count can not be quashed and the good one left.

2. The indictment charged the larceny of certain harness, the property of one Davis. The accused was found in possession of twenty-two sets of harness, including those described in the indictment. The State showed the larceny of the harness belonging to Davis, and relied for a conviction upon the inference of guilt arising from recent possession by the accused of the stolen property. Complaint is made that the court allowed proof of the theft of several sets of the harness found in the possession of the accused along with the Davis harness. The point made is that the evidence in reference to the other property was not admissible, because it appeared that in each instance the theft did not occur at the place where or the time when the larceny charged in the indictment took place. Ordinarily, evidence of other criminal transactions is not admissible. Some of the exceptions are when it shows "a system of mutually dependent crimes," or is "evidence of guilty knowledge," or bears upon the question of identity of the accused, "or articles connected with the offense," or where the evidence of other transactions tends to "prove malice, intent, motive, or the like." *Cawthon v. State*, 119 Ga. 395, 409 (46 S. E. 897, 901). If the evidence of other transactions tends "to illustrate the transaction in issue, or to establish some necessary ingredient of the particular offense under investigation," it is admissible. *Ray v. State*, 4 Ga. App. 67, 70 (60 S. E. 816). See also *Robinson v. State*, 6 Ga. App. 696, 711 (65 S. E. 792); *Hall v. State*, 7 Ga. App. 115, 120 (66 S. E. 390); *Lee v. State*, 8 Ga. App. 413; *Farmer v. State*, 100 Ga. 41 (28 S. E. 26). The fact that the accused was found at the same time and place in possession of other property of the same kind which had been stolen tended very strongly to show guilty possession of the property described in the indictment. Most of the harness found in the possession of the accused was obtained from irresponsible persons, and was shown to have been stolen. It is not reasonable that the accused could, without guilty knowledge, be in possession of so much stolen property, acquired from such a source. He was tried as the principal, and the State relied solely on recent possession unexplained. The important question was: Did the accused satisfactorily explain his possession of the Davis

harness, and thus rebut the inference of guilt arising from possession? On this question the evidence in reference to the possession of other stolen property of a similar nature shed a world of light. The State might well say to the accused: "You say you were a bona fide purchaser of the Davis harness, without knowledge that it was stolen, how comes it, then, that in the same place and at the same time you were found with twenty-two other sets of harness, many of which were also stolen, somewhere about the same time those belonging to Davis were taken?" The evidence not only illustrates, but illuminates the transaction at issue. It makes almost conclusive the inference that the accused either stole the Davis harness or received them knowing they were stolen. True, he was not on trial for receiving stolen goods, but since the State need show only recent possession of stolen goods, to make out a prima facie case of larceny, evidence in reference to the other property was just as much admissible in the one case as in the other. The court carefully confined the jury to the legitimate purpose for which the evidence might be used, and there was no error in the instructions on this subject. In *Hawkins's case*, 6 Ga. App. 109 (64 S. E. 289), the accused was not shown to have been in possession of other stolen property, nor was he connected in any way with the other articles which the prosecutor claimed to have lost.

3. The evidence fully supports the verdict. The requests to charge, so far as legal and pertinent, were covered by the general charge, which fairly presented the issues involved. The complaint in reference to the charge on the subject of impeachment is too general and indefinite to raise any question for decision. There was no error. *Judgment affirmed. Russell, J., dissents.*

3949. MARTIN v. THE STATE.

1. Counsel should not in their argument state prejudicial facts not appearing from the evidence, or not fairly deducible therefrom. Where, in a criminal case, a verdict of acquittal is authorized, and such a prejudicial argument is made by the State's attorney, it is error, requiring the grant of a new trial, to decline to rebuke counsel and give proper cautionary instructions to the jury, when timely objection to such argument has been made.
2. Statements made to the court by counsel while discussing a preliminary

motion, before the jury is impaneled, furnish no reason for setting aside a verdict.

3. Where in a criminal case all the evidence is circumstantial, it is erroneous to charge in such a way as to leave the impression that there is direct evidence against the accused.
4. Other points are controlled by the decision this day rendered in *Martin v. State* (No. 3848), ante, 795.

DECIDED MARCH 19, 1912.

Conviction of larceny; from city court of Floyd county—Judge Reece. December 21, 1911.

Eubanks & Mebane, for plaintiff in error.

John W. Bale, solicitor-general, *Moses Wright*, *A. W. Shanklin*, contra.

POTTLE, J. This is a companion case to that of *Martin v. State* (No. 3848), ante, 795. All the points raised in the present record are controlled by that decision, except those referred to in the headnotes of this decision.

Complaint is made of certain alleged prejudicial statements made by counsel for the State during the hearing of a motion for continuance and before the jury was impaneled. These statements, being made to the court, furnish no reason for setting aside a verdict afterwards rendered. The remedy, if the accused had any, was to challenge the poll of each juror and ascertain if the statements made in his hearing by the State's attorney had prejudiced the juror against the accused. *Smith v. State*, 7 Ga. App. 253 (2b); *Kidd v. State*, ante, 148.

The evidence was wholly circumstantial. This being true, it was inaccurate and probably harmful for the court to state to the jury that it was claimed that at least a part of the evidence was circumstantial. The only really material error in the record is that indicated by the first headnote. The accused was found in the recent possession of a set of harness belonging to one Wilkerson; and there was evidence that this set of harness had been stolen. It also appeared that a number of other sets of harness were found in the possession of the accused at the time and place at which the harness described in the indictment was found. Unlike the evidence in the case against the accused, reference to which has hereinbefore been made, there was no evidence that any of these sets of harness, except that belonging to Wilkerson, had been stolen. There was evidence that the accused was a small trader, and that for sev-

eral years he had been engaged from time to time in buying and selling articles such as those which were found in his possession. While making the concluding argument to the jury, one of the attorneys employed to assist the solicitor-general used this language: "Officers found Claud Wilkerson's harness in Will Martin's barn, along with 22 other sets of stolen harness." Counsel for the defendant objected to this argument, and moved the court to declare a mistrial. "The court overruled the motion to declare a mistrial, declined to rule out said statement and to rebuke counsel for making it, and failed to caution the jury that such statement was improper." This court is not disposed to unduly circumscribe counsel in their arguments, but, on the contrary, is inclined to allow them all reasonable latitude, provided they do not go beyond the facts in evidence, or inferences which may be fairly deduced therefrom. There is nothing in the evidence in this case to indicate that there were 22 other sets of stolen harness in the barn of the accused. Nor is there any testimony from which such an inference could fairly be drawn. It certainly was not fair to assume that because these sets of harness were found in the possession of the accused they had necessarily been stolen. It is very probably true that the counsel who made the statement may have had in mind the evidence which had been introduced in the other case against this same defendant, to the effect that several of these same sets of harness had in fact been stolen. In the other case we held that this evidence was admissible; and, hence, it would have been legitimate, with this evidence in, for counsel to have commented upon it; but, in the absence of such evidence, it was altogether improper to make the statement above quoted, and, when objection was made to it by counsel for the accused, the court should at least have rebuked counsel and cautioned the jury to disregard the improper statement. Having failed to do this, and the argument being of such a nature as naturally to prejudice the defense, a new trial is ordered, upon this ground alone, there being evidence in the record from which the jury might properly have returned a verdict of acquittal.

Judgment reversed.

3951. DIXON v. CITY OF WAYNESBORO.

HILL, C. J. This being a certiorari sued out to review the judgment of a municipal court, and there being in the petition no averment that the bond required by the act approved December 10, 1902 (Acts 1902, p. 105), had been given, or the pauper affidavit filed, and it nowhere appearing in the record that the bond or the pauper affidavit had been filed, there was no error in dismissing the certiorari. *McDonald v. Ludowici*, 3 Ga. App. 654; *Allen v. Atlanta*, 7 Ga. App. 99; *Veasey v. Crawfordville*, 126 Ga. 89. Judgment affirmed.

DECIDED MARCH 19, 1912.

Certiorari; from Burke superior court—Judge H. C. Hammond.
October 6, 1911.

C. B. Garlick, for plaintiff in error.

E. L. Brinson, contra.

3954. ADAMS v. THE STATE.

- POTTE, J. 1. No contract "clear and definite in its terms" having been shown, the evidence was not sufficient to authorize a conviction of cheating and swindling, under the act approved August 15, 1903 (Acts 1903, p. 90). *Saunders v. State*, 7 Ga. App. 46 (65 S. E. 1071).
2. Even if the evidence was sufficient in other respects, the contract was too indefinite as to the character of the work to be performed.

Judgment reversed.

DECIDED MARCH 19, 1912.

Accusation of cheating and swindling: from city court of Sparta
—Judge Moore, December 21, 1911.

T. M. Hunt, for plaintiff in error.

R. L. Merritt, solicitor, *T. F. Fleming*, contra.

3956. MONTGOMERY v. THE STATE.

RUSSELL, J. The statement of the judge, in directing a verdict for two of three defendants jointly indicted, that he would express no opinion as to the guilt or innocence of the third defendant (the plaintiff in error here), is not subject to criticism as being expressive of an opinion as to the defendant's guilt, nor prejudicial to his right to a fair trial. The trial was free from error, and the evidence fully authorized the conviction of the offense of voluntary manslaughter.

Judgment affirmed.

DECIDED MARCH 19, 1912.

Conviction of manslaughter; from Colquitt superior court—
Judge Thomas. December 16, 1911.

W. F. Way, W. A. Covington, for plaintiff in error.

J. A. Wilkes, solicitor-general, contra.

3958. SLADE *v.* THE STATE.

RUSSELL, J. The excerpts from the charge of the court, when considered with the context of the charge as a whole, are not objectionable as intimating or expressing an opinion upon the evidence. The evidence authorized the verdict, and there was no error in refusing a new trial.

Judgment affirmed.

DECIDED MARCH 19, 1912.

Indictment for wife-beating; from Crisp superior court—Judge Whipple. December 30, 1911.

Crum & Jones, for plaintiff in error.

Max E. Land, solicitor-general, J. T. Hill, J. W. Dennard, contra.

3959. NORMAN *v.* THE STATE.

“There are no words plainer than ‘reasonable doubt,’ and none so exact to the idea meant.” The expressions, “reasonable and moral certainty,” and “to the exclusion of a reasonable hypothesis,” may be logically the equivalent of “beyond a reasonable doubt,” but are not so easily understood by the ordinary lay mind. In every criminal case the court should charge the jury that to authorize conviction, guilt must be proved “beyond a reasonable doubt;” and, unless the evidence demands the verdict rendered, the failure to do so will be reversible error.

DECIDED MARCH 19, 1912.

Indictment for larceny; from Colquitt superior court—Judge Thomas. December 16, 1911.

W. A. Covington, James Humphreys, for plaintiff in error.

J. A. Wilkes, solicitor-general, contra.

HILL, C. J. Albert Norman was convicted of simple larceny, and his motion for a new trial was overruled. The evidence, though not conclusive, was sufficient to support the verdict. Only one assignment of error contains merit. The trial judge failed to instruct the jury on the doctrine of “reasonable doubt.” This doctrine is so thoroughly imbedded in the jurisprudence of our country, and in a

close case is so valuable to the accused, that the omission to give it in charge must be deemed hurtful. It is claimed by the State that the judge did substantially charge the rule. He charged as follows: "The defendant is presumed by law to be innocent, and that presumption remains with him until his guilt is established by testimony, to the exclusion of any other reasonable hypothesis." It is insisted that the language "reasonable hypothesis" is not the equivalent of "reasonable doubt;" that the expression "reasonable hypothesis" was not given in connection with the law as to reasonable doubt, was not explained to the jury, and its meaning was not easily apparent or comprehensible to the lay mind; in other words, that the ordinary juror would understand what was meant by the words "beyond a reasonable doubt," and might not understand what was meant by the words "to the exclusion of any other reasonable hypothesis." On this subject the court charged further: "Moral and reasonable certainty is all that can be attained in legal investigation. In civil cases a preponderance of the testimony is sufficient to produce mental conviction. In criminal cases a greater strength of mental conviction is necessary to justify a verdict of guilty. The true question in criminal cases is, not whether the conclusion at which the testimony points may be false, but whether there is sufficient testimony to satisfy the mind and conscience of the jury of the guilt of the defendant, and, in cases of circumstantial evidence, to the exclusion of every other reasonable hypothesis save the guilt of the defendant." Are these excerpts, on the subject of the degree of mental conviction necessary to warrant a verdict of guilty, equivalent to the law which declares that, "whether the defendant relies upon positive or circumstantial evidence, the true question in criminal cases is, not whether it be possible that the conclusion at which the testimony points may be false, but whether there is sufficient testimony to satisfy the mind and conscience beyond a reasonable doubt?" Penal Code (1910), § 1013. It has been held that the term "moral certainty" is equivalent to the words "beyond a reasonable doubt." *Austin v. State*, 6 Ga. App. 211 (64 S. E. 670); *Bone v. State*, 102 Ga. 391, and citations. In the *Bone* case it is said: "It is difficult to conceive how the mind of a juror may reach a conclusion as to a fact to the point of moral certainty, and yet be rendered uncertain by the existence of a doubt of that fact which is reason-

able." In that case the complaint was not as to the failure to charge the law of reasonable doubt, but as to the judge's addition, to a correct instruction on that subject, of the words: "the jury must be satisfied of guilt to a moral and reasonable certainty;" it being insisted that these last words qualified or modified the strength of mental conviction required by the words "beyond a reasonable doubt." The court held that the use of both expressions in the same connection was "intended to convey to the jury the idea that the reasonable and moral certainty of guilt to which [the judge] referred was mental conviction excluding any reasonable doubt of guilt," and, so considered, the charge was not erroneous. It is fair to infer from this decision that if the court had not used the words "beyond a reasonable doubt," but only the words "to a moral and reasonable certainty," the charge would have been held erroneous. See *Davis v. State*, 114 Ga. 104 (39 S. E. 906); *Robinson v. State*, 128 Ga. 258 (57 S. E. 315). In the case sub judice the presiding judge did not use the words "beyond a reasonable doubt;" he used the expressions, "to the exclusion of any other reasonable hypothesis save the guilt of the defendant," and "establish guilt to a moral and reasonable certainty." It may be conceded that these expressions are logically and legally the equivalents of "beyond a reasonable doubt;" and, if the jury was composed of erudite men familiar with legal or logical terminology, either might be used to express the degree of mental conviction necessary to convict of crime. But we venture to say that the expression "reasonable hypothesis" would convey no very definite idea to the mind of those ordinarily selected as jurors, and the words "moral and reasonable certainty" would be little more illuminating. The words "beyond a reasonable doubt" are easily understood by every man. They require no definition. Indeed, attempts to define them are generally neither helpful nor accurate. As justly said by Bishop: "There are no words plainer than 'reasonable doubt,' and none so exact to the idea meant." 1 Bishop's New Criminal Procedure, § 1094. Learned counsel for the plaintiff in error insist that no conviction in Georgia has been allowed to stand when the expression "reasonable doubt" does not occur in simple terms in the charge of the court. So far as our research goes we have not found a criminal case where the jury was not instructed that they must be con-

vinced of guilt beyond a reasonable doubt before they could convict; and possibly the doctrine is so elementary and well known that the jury would be guided by it even without instructions. But so valuable to human liberty is the rule of "reasonable doubt" that this court is unwilling to accept for it any equivalent.

Judgment reversed.

3963. MOORE v. THE STATE.

1. While, as a general rule, the right of counsel to argue as to occurrences which have taken place in the presence of the jury during the trial, and to suggest to the jury any inferences legitimately deducible therefrom, is not to be abridged, still, in a criminal case, the prosecuting attorney should not be permitted, over the defendant's objection, to express his individual opinion that the defendant then on trial is guilty, or to argue that the failure of the defendant to introduce testimony is attributable to a sense of conscious guilt.
2. Improper remarks of counsel will not work a new trial where timely objection is not made, or where it plainly appears that, under the law and the evidence, no other result was possible than that reached in the verdict rendered.
3. Other than as dealt with in the first and second divisions of the opinion, the trial was free from error.

DECIDED MARCH 19, 1912.

Indictment for sale of liquor; from Coffee superior court—Judge Parker. November 8, 1911.

J. W. Quincey, C. A. Ward, W. A. Wood, F. Willis Dart, for plaintiff in error.

M. D. Dickerson, solicitor-general, McDonald & Willingham, contra.

RUSSELL, J. Section 4957 of the Civil Code (1910) declares, that "Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same; and, on objection made, he shall also rebuke the same, and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the plaintiff's attorney is the offender." As pointed out by Justice Cobb in *O'Dell v. State*, 120 Ga. 155 (47 S. E. 577), this section is a codification of rulings contained in two criminal and two

civil cases,—*Croom v. State*, 90 Ga. 430 (4), (17 S. E. 1003); *Farmer v. State*, 91 Ga. 720 (2), (18 S. E. 987); *Augusta Railroad Co. v. Randall*, 85 Ga. 298 (6), (11 S. E. 706); *Metropolitan Street Railroad Co. v. Johnson*, 90 Ga. 501 (6), (16 S. E. 49). In the criminal cases above cited, and in the *Johnson* case, *supra*, the ruling was invoked; but in the *Randall* case, *supra*, the judgment was reversed even though it does not appear that a ruling was invoked. In the present case it appears, from the note of the presiding judge, that the defendant had twice moved to continue the case, on account of the absence of a witness, Roy Paulk, upon the statement that he expected to prove by this witness that the State's witness was of bad character, and not worthy of belief, and had made statements denying that he had bought the liquor from the defendant. In other words, the defendant had stated, upon the showing for a continuance, that he expected to elicit from the absent witness, for the purpose of impeaching the State's witness, evidence of the bad character of the State's witness, and also expected to prove by the absent witness that the State's witness had made contradictory statements as to matters material to the issue.

It appears, from the recitals of the ground of the motion for new trial, as approved by the trial judge, that the motion for a continuance was made on Tuesday, November 7, the day previous to that on which the trial was held, and the court did not at that time put the defendant to trial, but directed the sheriff to bring in the witness Paulk, and, when the case was tried on Wednesday, Paulk was present, and was sworn, but was not introduced by the defendant. In his argument to the jury J. N. McDonald, Esq., who was of counsel for the State, referred to the statement of counsel as to desiring the presence of the witness Paulk, and argued that the defendant had failed to introduce this witness or to prove by him what counsel said he expected to prove by him, and that the statement was made to continue the case solely for delay, adding, in his argument, "that the said statement had been made because the defendant knew he was guilty, and for the purpose of flim-flamming the court, and to continue the case, and . . . that this was an evidence of the defendant's guilt." At the commencement of this part of the argument the defendant's counsel objected, upon the ground that there was nothing in the record, or before the jury, or in the evidence, to authorize this kind of argument, and that

it was prejudicial to the defendant's case, and requested the court to require counsel to desist from this kind of argument. The court overruled the objection, and held that it was permissible for counsel to argue before the jury anything that came up during the term of court in the presence of the jurors, in connection with the case, either during the trial or prior thereto, and that he would permit State's counsel to continue the argument along this line. The State's counsel thereafter proceeded with the argument, over the opposing counsel's objection.

The question presented by this assignment of error is twofold: (1) Was the argument unauthorized and prejudicial to the defendant? (2) If so, was the attention of the judge called to it, and his authoritative intervention so properly invoked as that his refusal to sustain the objection, and to endeavor to remove the impression made upon the mind of the jury by improper argument, was error, requiring the grant of a new trial? The proposition that argument not based upon evidence is, generally speaking, improper scarcely needs to be supported by citation of authority. The jury are sworn in every criminal case to render a true verdict according to the evidence, but, as the right of counsel to argue many circumstances which may legitimately appear upon the trial in connection with the taking of the testimony is not to be unduly prescribed, it is manifest that argument with reference to these matters is not to be inhibited, and that to confine counsel solely to the words of the testimony would be to give the rule too narrow a meaning. As the law allows the jury to judge of the manner of the witnesses on the stand, and to weigh their testimony by their interest in the case, and measure their credibility by various other circumstances which may present themselves to the attention of the jury during the trial, it is plain that the jury, in determining as to the credibility of testimony put before them, can consider some matters which would not come within the testimony itself. The testimony of a particular witness might make or disprove the case of guilt, and yet his manner, as a whole, might convince the jury that he did not speak the truth when he stated the facts by him related. Certainly anything that occurs in the presence of the jury, after they are impaneled, which could legitimately throw light on the credibility of any witness, or which could add or detract from the weight of his testimony, would be legitimately a subject-matter for their

consideration, and, consequently, proper subject of argument on the part of counsel.

In the present case, however, the statements which were being criticised by counsel were not addressed to the jury, but were made to the judge, in moving to postpone or continue the case. Juries have no duty in connection with the continuance of a case, and no power to affect a judgment upon the motion. The jury does not hear, as evidence in the case, the evidence relating to a motion for continuance; for they have no power to pass upon the sufficiency or credibility of such testimony. It is a matter solely for the court. On the motion for continuance the judge may disbelieve a witness whom the jury might believe, or on counter-showing he may believe a witness whom the jury would entirely discredit, so that in a technical sense the evidence submitted to a court, upon a motion for continuance or postponement, is not the evidence with which the jury have to deal upon the trial, or the evidence included in their oath. Plainly, then, the objection of the counsel for the plaintiff in error, that the argument was not authorized by evidence, is supported. Nor does it appear that the showing for continuance was made in the presence of the jury who actually tried the case. As the motion for postponement was made the day before the trial, the jury, of course, had not been impaneled. The particular twelve jurors to whom the argument of State's counsel was being addressed may have heard the statement of counsel on the day previous, or they may not. Until they were impaneled there was nothing to require their attention to evidence, and, furthermore, a portion of the jury might have been engaged in some other case at the time the case was called on a previous day, or some of them might have been temporarily excused from the court-room. There is nothing to show that the identical twelve men who were passing upon the issue of the defendant's guilt or innocence, and who had been sworn to determine that issue according to the evidence, were present the previous day and heard what transpired. Furthermore, the statement in reference to what was expected to be shown by the absent witness seems to have been made, not by defendant himself as a witness under oath, but merely as the statement of defendant's counsel in his behalf.

For all of these reasons it seems to us that any reference to the statements of the defendant's counsel the previous day, before the

jury were impaneled, can readily be determined to be improper, though not necessarily prejudicial; and certainly they are not ground for reversal, unless proper and timely objection was made. The rule seems to be well settled that, unless an objection is interposed and some ruling on the part of the court is invoked, a party will be deemed to have waived his right to objection, and, after verdict, will not be heard to assign error upon improper argument. As the converse to this proposition, it appears, from the cases cited, that where counsel indulges in argument unsupported by evidence, and not based upon any matter which occurred during the trial in the presence of the jury after they were impaneled, a new trial should be granted, if the intervention and protection of the court is invoked in the proper way and at the proper time, and is refused.

Practically the same point as is here involved seems to have been decided upon practically the same state of facts in *Blackman v. State*, 78 Ga. 592 (3 S. E. 418); and, while this ruling was not made by a full bench, the similarity between the facts in that case and in the instant one, as well as the soundness of its reasoning, would commend it as a safe precedent. In that case the court said (p. 595): "On the twenty-third ground of this motion we shall be compelled to send this case back for another hearing. That ground complains that the court, despite the objection of the defendant's counsel, permitted Edgar M. Butt, Esq., one of the counsel for the State, to refer in his argument to what the prisoner in his motion for continuance said he could prove, and to mention that the defendant had failed to prove what he said he could prove, and to insist upon this before the jury as an evidence of guilt. On the margin of the paper containing this ground of the motion there is the following note, signed by the judge: 'Defendant made a motion for continuance on account of absent witnesses; the court delayed the case and sent for and procured the absent witnesses; they were not introduced, and Judge Butt'—Here the note ends. It undoubtedly shows that he had not reached the end of what he intended to state; he probably intended to add more, but the record does not show what it was. Now this defendant, as appears from the record, had made a motion to continue this case for the absence of certain witnesses, by whom he expected to prove that he was not near the scene of the homicide at the time it took place.

These persons were sent for. They appeared, but he failed to introduce them. This motion was made, it will be remarked, before the jury was empaneled, and was probably made in writing, or if made orally, there was no evidence of it before that jury; and it was certainly a very damaging circumstance to allow counsel to proceed and argue the guilt of the prisoner from his failure to produce these witnesses; and when the court's attention was called to this subject, he should promptly have reproved the proceeding and admonished the jury that it was improper, and that they should give it no attention; but this he seems to have declined. Unless this was a case of circumstantial evidence so strong as to imperatively demand the finding the jury made, we can easily see how injury, and great injury, might have resulted to this defendant from such a course of proceeding. The defendant may be guilty, and may have been proved to be guilty, but his guilt could be established only by legal testimony properly introduced to the jury by witnesses with whom he was entitled to be confronted. Has the defendant had a fair trial with none but legal testimony before the jury? We think not; we can not undertake to say what influence the circumstances improperly insisted upon in the argument may have had upon the jury; and a new trial is therefore granted solely upon the 23d ground of the motion."

The State's counsel relies upon the earlier case of *Inman v. State*, 72 Ga. 269, as presenting a rule contrary to the rule laid down in the *Blackman* case, *supra*, and as controlling, because an earlier authority. We do not see that the decision in the *Blackman* case in any wise conflicts with the ruling in the *Inman* case. All that was said by the solicitor-general in the *Inman* case, as explained by the trial judge, was that the defendant had moved for a continuance on the ground of the absence of a witness, and when this witness was produced in court he did not have him sworn as a witness. The only comment of the solicitor-general upon the alleged facts was that counsel for the defendant had dilly-dallied with the case. There was no criticism of the defendant himself, nor any charge that the conduct of the defendant or of his counsel was influenced by any motive other than the desire for delay. There was not even a suggestion, in the argument of the State's counsel, that the conduct of the defendant's counsel was conclusive of the defendant's guilt, and certainly there was no as-

sertion, as in the present case, that that conduct was due to the defendant's consciousness of guilt. The most that appeared in the *Inman* case is that the solicitor-general criticised the delay in the case. But desire for delay, in some cases, might be consistent with the defendant's innocence. In the present case counsel for the State asserted unequivocally that the whole purpose was to "flim-flam" the court into granting a continuance, and that the witness was not produced because the defendant was guilty and conscious that he was guilty. In the *Inman* case Justice Blandford did not enter into a discussion of the principles involved, but seems to have decided the point merely with reference to the particular circumstances which surrounded it, and it did not appear that the argument necessarily concerned the question of the guilt or innocence of the accused. Furthermore, in the *Inman* case the defendant's counsel merely entered a general objection. He did not invoke any affirmative relief. In the *Blackman* case (while it is a later case) the reasons upon which it is based are stated, and the general result of permitting argument not authorized by evidence, and as to matters not addressed to the jury, was in the mind of the court. In comparing the decisions in these two cases it must be remembered, even if we adhere to the rule which gives authority to the older decision, that the subject was not at that time embraced in the code. All of the rulings to which we have referred as forming the basis of section 4957 of the Civil Code of 1910 were made subsequently to the decisions in these two cases, but in 1895 the legislature embodied those rulings in the code (Civil Code of 1895, § 4419), and for that reason, in so far as anything ruled in either of these cases conflicts with the code, it must yield to the express legislative mandate. As we stated above, it would seem to follow, from the rulings in which new trials were refused because no objection to the prejudicial argument was interposed at the time of the argument, that if objection had been interposed, as in the present case, a new trial would have been granted.

In our opinion, therefore, the question in every case turns upon whether the nature of the argument is such that it is manifestly improper and prejudicial to the rights of the opposite party. If the nature of the remark is such that it can plainly be seen that it could not have affected the result, the error would be harmless, and would afford no ground for a new trial. For this reason, if the ar-

gument was directed to some collateral matter not directly affecting the guilt or innocence of the accused in a criminal trial, though the argument might be improper, the error would seem to be immaterial. Under this head we might class criticisms of the defendant's appearance, style of dress, tone of voice, and physical defects. While such argument would be improper, it might not be prejudicial, though in some jurisdictions it has been held to be reversible error. On the other hand, if the statement is an expression of the personal opinion of the prosecuting attorney in a criminal case that the defendant is guilty, this is error, and it must be presumed to be prejudicial error, because cases can be imagined where counsel might be engaged for the prosecution whose personal opinion would have such weight with the jury as to unduly affect their finding upon the facts, or if the argument is such, although deducible from some of the evidence, as to address itself unfairly to passion or prejudice, as in the *Farmer* case, supra, this, if objected to, would afford ground for a new trial, because the argument is not legitimate. For the same reason, the pressing upon the jury of an inference drawn from facts outside of the evidence, or circumstances which may not rest within the knowledge of the jury, except from the statement of counsel, is manifestly improper; and, where the inference drawn from such unauthorized statements is adopted and used as conclusive evidence of guilt, it can not be said to be harmless.

When counsel in the present case asserted that the defendant was trying to "flim-flam" the court, because he had moved to continue his case, counsel was addressing an argument to the jury with which they had no concern. The argument might have been proper to the court in resisting the motion for continuance, but certainly the only effect of it before the jury would be to prejudice them against the defendant; for the question before the jury was not whether the defendant's motion for a continuance was meritorious, but whether he was guilty of the offense charged in the indictment; and counsel's statement that the defendant had not put up the witness because he knew he was guilty seems to us to be objectionable for the same reason that counsel for the State is not permitted to state to the jury that the defendant has not made a statement, or to argue, from the fact that the defendant has not made a statement, that it may be inferred that he is guilty of the offense charged.

The rule that the defendant's failure to make a statement can not be commented upon has been rigidly adhered to ever since it was laid down in *Bennett v. State*, 86 Ga. 401 (12 S. E. 806, 12 L. R. A. 449, 22 Am. St. R. 465). If the law, in its care for the rights of defendants and in seeing that they are accorded a fair trial, deems it no proper evidence of guilt that the defendant (who most frequently has it within his power to explain circumstances evidencing his guilt) makes no statement in his own behalf, it would seem that an inference of guilt, dependent only upon the fact that the defendant decided not to introduce a witness whom he had summoned, and whom he said he desired to use for the purpose of impeachment, would not rest upon a more substantial basis. If it is not permissible to argue that the defendant is probably guilty because he sits silently by and does not deny the truth of statements which he, above all others, must know to be false, when the jury can believe his statement in preference to sworn testimony, it would seem unreasonable that the law should permit the jury to presume that the defendant is guilty because he did not introduce a witness whom he had summoned for the purpose of impeaching a witness testifying against him. Incriminatory circumstantial evidence is faulty unless it produces such conviction as excludes any other reasonable supposition than the hypothesis claimed. It is just as reasonable to suppose that a defendant's reason for not introducing a witness he has subpoenaed is that the witness does not know, or will not testify to the fact that the defendant wishes to establish, as to entertain any other supposition that can arise; but the fact that that witness does not know or will not testify to the particular fact does not disprove the existence of that fact. On the contrary, the fact may be well known to others, who may or may not be present, and who may or may not testify.

Taking the facts of this particular case: The presence of the witness Paulk, as stated by the defendant's counsel, was desired because they expected, by his testimony, to prove the general bad character of one of the State's witnesses, and also contradictory statements on the part of the same witness. The jury saw the witness Paulk sworn by the defendant. The most that could have been argued from this by State's counsel, under any view of the case, would have been that, as the defendant did not introduce Paulk, the jury might reasonably infer that Paulk would not testify to the

general bad character of the State's witness, or to any contradictory statements made by the witness; and yet we do not think that from this the jury would have been authorized to infer that the defendant was conscious of his guilt or guilty. The defendant might have been misinformed as to what Paulk would swear, or, even if this was not the case, it sometimes happens that a witness will "talk" differently from what he will swear. Granting even that the defendant did not know that Paulk would swear as his counsel, on the motion for a continuance, stated that they expected him to swear, or that the defendant knew he would not swear either to the bad character of the State's witness or to any contradictory statements, this fact does not necessarily lead to the conclusion that the defendant was guilty and conscious of guilt, though it would have shown him to be acting in a most reprehensible manner, in attempting to "flim-flam" the court. It is reasonable to suppose that in many cases parties determine from developments in the case, not to introduce particular witnesses, and sometimes not to introduce any testimony, in order to gain the advantage of a concluding argument, or because the point which they desire to put in proof has already been established by testimony coming from the opposite side. Sometimes the bad character of the witness can be demonstrated by cross-examination as effectually as it would by testimony from the mouths of witnesses that they would not believe him on oath. The nature and manner of his testimony may be such as to satisfy the jury that they would not believe him on oath; and this is the all important desideratum. We conclude, therefore, that when the court gave sanction to the argument that an inference of guilt could arise from the fact that the defendant had not introduced the witness for the purpose of impeaching the State's witness, as it had been stated he intended to do, and permitted the counsel for the State to continue the argument, the jury were presumably misled and influenced by this argument to the prejudice of the defendant. But for this error we would unhesitatingly affirm the judgment, for there is no merit in the several exceptions to the charge of the court. The evidence would have authorized the conviction of the defendant, but the credibility of the State's witness was the issue in the case. The witness admittedly had a tremendous interest in the case, because he was charged with the same offense, and upon the result of the defendant's case

depended the acquittal or conviction of the witness. If the defendant in this case should have been acquitted, the guilt of the witness seemed to be inevitable. If the defendant in this case should be convicted, the witness had an excellent chance to be acquitted. If the defendant's omission to break down the testimony of this witness for the State, when it was in his power to do so, was due to the consciousness of guilt, as asserted by the State's counsel, it might have been conclusive to the jury. There was no evidence as to the defendant's inner consciousness, and the place of such evidence could not be supplied by an inference arising from his failure to introduce a witness, unless it could have been to prove his real reason for not introducing the witness. The mere non-introduction of a witness, where it was not claimed that the witness knew anything of the actual transaction, could not more reasonably raise such an inference than the fact that the defendant preferred not to surrender the right of having his counsel make the concluding argument.

The argument was improper and prejudicial. The court should have sustained the objection, and should at least have reproofed counsel and instructed the jury not to regard the reference which had been made to the motives of the defendant, but to determine his guilt or innocence from the evidence before them.

Judgment reversed.

POTTLE, J., dissenting.

I agree with the State's attorney, that the accused "was guilty and knew he was guilty." I do not think it was improper for State's counsel to tell the jury that the defendant was guilty. A juror of average intelligence must have understood this simply to be counsel's contention under the evidence. If one is guilty, he necessarily knows it, and therefore the further contention of counsel that the accused knew he was guilty was not prejudicial. The Supreme Court has more than once held that counsel may allude in argument to what has occurred in the case "from the time it is called, through its entire progress, and the conduct of the party or his counsel in connection therewith is a proper subject-matter for argument." To my mind the point is controlled by *Inman v. State*, 72 Ga. 269 (3), nor do I think the ruling therein made was changed by the code.

3964. BRUNDRIGE v. THE STATE.

The contract between the prosecutor and the accused created the relationship of vendor and vendee, and not that of landlord and tenant, and the prosecution for a violation of section 721 of the Penal Code (1910), was unauthorized.

DECIDED MARCH 19, 1912.

Accusation of misdemeanor; from city court of Sparta—Judge Moore. December 23, 1911.

T. M. Hunt, for plaintiff in error.

R. L. Merritt, solicitor, contra.

HILL, C. J. The plaintiff in error was convicted of a violation of sections 720 and 721 of the Penal Code of 1910, making it a misdemeanor for a tenant to sell or otherwise dispose of the year's crop before the payment of the rent, or for advances made upon the crop, without the consent and to the injury of the landlord. His motion for a new trial was overruled, and he brings error. There is one controlling question of law raised by the record. Was the relationship between the accused and the prosecutor that of landlord and tenant, or that of vendor and vendee? This must be determined by the contract between the two. It is as follows: "This is to certify that I, Eddie Brundrige, have this day leased from Mrs. Eva H. Tye, her heirs, executors, or assigns, all that part of the Henry Culver tract of land lying west of Sandy Run creek, being and lying in the 101st District G. M. of Hancock county, Georgia, containing 315 acres, more or less, for the term of seven years, for which consideration I have signed and delivered to Mrs. Eva H. Tye seven rent notes, all dated this date, and to become due and to contain the amounts that will appear on the face of each note as described here below. All bearing interest from date of maturity at the rate of eight per cent. per annum, and each of them in the principal sum of \$340.20, all payable to Mrs. Eva H. Tye on October 1st, 1911, Oct. 1st, 1912, Oct. 1st, 1913, Oct. 1st, 1914, Oct. 1st, 1915, Oct. 1st, 1916, Oct. 1st, 1917. It is agreed and understood by the parties hereto that should there be any default in the prompt payment of all principal and interest, as above specified, then at the option of the holder of said notes they shall become due and payable at the date of such default, regardless of the dates of maturity, thereby divesting the said Eddie Brundrige out of all rights, title, and equities that he may have in and to the said prop-

erty, and vesting the same in the aforesaid Mrs. Eva H. Tye. Should, however, I, Eddie Brundrige, well and truly pay said rent notes, then the said Mrs. Eva H. Tye binds and obligates herself to give to Eddie Brundrige guaranteed deeds to the aforesaid tract of land. [Signed] E. A. Brundrige (L. S.). Signed, sealed, and delivered in the presence of M. Arnold, N. P. & J. P."

While the instrument is not signed by Mrs. Eva H. Tye, it is manifestly intended as in the nature of a bond for title. The consideration for the sale of the land is the sum represented by the notes, and, if they were promptly paid on maturity, Mrs. Tye agreed to execute a deed to the described land to the maker. The defense relied upon was, that Mrs. Tye did not sign this contract as she had agreed to do, and that for this reason the accused refused to pay the note, as Mrs. Tye, by refusing to sign the obligation to make him a deed to the land, placed him where he could not compel her to make title. The case of *Wilkins v. Fulcher*, 9 Ga. App. 68 (70 S. E. 691), relied upon by the prosecution, is distinguished from the instant case on the facts. There the bond for title recited that if the vendee failed to pay the purchase-money notes for the land the sale was to be rescinded, and in that contingency he promised to pay a stipulated sum as rent. Here there is no such promise. It is manifest that the relation of vendor and vendee, and not that of landlord and tenant, was created by the terms of the instrument; and it follows that the criminal prosecution was unauthorized.

Judgment reversed.

3965. SPEER v. THE STATE.

RUSSELL, J. The evidence authorized the conviction, and there was no error in refusing a new trial. Even if the newly discovered testimony which it was sought to present by affidavit is not merely cumulative and impeaching, the judge did not err in overruling the ground of the motion for new trial based upon alleged newly discovered evidence, inasmuch as the character of the affiants was not vouched for, and there was no affidavit to show that the facts alleged to have been ascertained subsequently to the trial were unknown to the defendant and his counsel at the time of the trial, or that this evidence could not have been obtained in time for the trial by the exercise of ordinary diligence.

Judgment affirmed.

DECIDED MARCH 19, 1912.

Indictment for sale of liquor; from Spalding superior court—
Judge R. T. Daniel. December 18, 1911.

W. H. Connor, for plaintiff in error.

J. W. Wise, *solicitor-general*, contra.

3971. WYNNE v. CITY OF ATLANTA.

- POTTE, J. 1. Unless there is something in the charter to the contrary, it is not necessary that a person accused of a violation of a municipal ordinance shall be furnished with a written accusation or statement of the charge made against him. It is sufficient if he be informed of the charge and be given an opportunity to defend. *Pearson v. Wimbish*, 124 Ga. 710 (52 S. E. 751, 4 Ann. Cas. 501); *Venable v. Atlanta*, 7 Ga. App. 190 (66 S. E. 489).
2. A violation of a municipal ordinance prohibiting the keeping of intoxicating liquors for unlawful sale is shown by proof of possession and sale of such liquors within the limits of the municipality. *Sawyer v. Blakely*, 2 Ga. App. 159 (58 S. E. 399).
3. "All who violate or assist in violating a municipal ordinance, directly or accessorially, are equally guilty as principals." *Stradley v. Atlanta*, 7 Ga. App. 441 (67 S. E. 107).
4. No error of law having been committed by the recorder, and there being sufficient evidence to support the judgment of conviction, the judge of the superior court did not err in overruling the certiorari.

Judgment affirmed.

DECIDED MARCH 19, 1912.

Certiorari; from Fulton superior court—Judge Pendleton. November 29, 1911.

John A. Boykin, for plaintiff in error.

J. L. Mayson, *W. D. Ellis Jr.*, contra.

3972. EADY v. THE STATE.

- HILL, C. J. 1. A prosecutor is one who instigates a prosecution by making an affidavit charging a named person with the commission of a penal offense, on which a warrant is issued or an indictment or accusation is based. 6 Words & Phrases Judicially Defined, 5739.
2. An act of the legislature creating a city court, which provides that "defendants in criminal cases . . . shall be tried on a written accusation . . . founded upon the affidavit of the prosecutor," is fully complied with by a written accusation filed in the court, signed by the solicitor of the court, which recites that it is founded upon a desig-

nated affidavit, set out in full immediately preceding the accusation, and referred to therein as the "above and foregoing affidavit."

Judgment affirmed.

DECIDED MARCH 19, 1912.

Accusation of gaming; from city court of Blackshear—Judge Milton. December 12, 1911.

E. H. Williams, for plaintiff in error.

S. F. Memory, solicitor, contra.

3975. GUNN *v.* THE STATE.

1. Where a plea of misnomer is filed, and the merit of the plea (so far as concerns the verity of the statement that the defendant is charged by a name other than his true name) is dependent upon an inspection of the original indictment or other accusation, the decision of the trial judge, that the name in which the accused is charged in the indictment is the same as that which his plea admits to be his true name, is final, where the writing in the indictment, though somewhat illegible or unintelligible, can reasonably be said to represent the true name of the accused.
2. The charge that an indictment has been altered since it was returned into court can not be presented by demurrer.
3. The judge of the superior court did not err in overruling the petition for certiorari.

DECIDED MARCH 19, 1912.

Certiorari; from Greene superior court—Judge J. B. Park. December 23, 1911.

J. A. Beazley, for plaintiff in error.

J. E. Pottle, solicitor-general, *James Davison*, contra.

RUSSELL, J. To the indictment (which had been transferred from the superior court to the county court of Greene county) the defendant interposed a demurrer, setting up that the indictment did not charge him with any offense, because it alleged that Paul Green, alias Coot Green, did play and bet for money, and not Paul Gunn; and that the demurrant had never been known as Paul Green; also that the indictment showed on its face that it was not in the shape in which it was when it left the grand-jury room, or was returned by the grand jury, for "some one had attempted to make Gunn out of Green." A third ground of the demurrer, based upon the fact that a prior indictment for the same offense had been

quashed, was not insisted upon. The defendant also filed a plea of misnomer, alleging that he had never been known by the name of Paul Green, or Coot Green; that his true name was Paul Gunn, and he had sometimes been known by the name of Coot Gunn, but had never been known by any other name or names, and never by the name of Paul Green or Coot Green. The judge of the county court overruled the demurrer and the plea of misnomer; and the judge of the superior court sustained these rulings by overruling a petition for certiorari.

1. It is very plain, from the record, that the judge of the county court, who had the original indictment before him, overruled the plea of misnomer because it appeared to him that the indictment did not charge the defendant in the name of Paul Green or Coot Green, as alleged in the plea, but that the indictment stated the name of the accused to be Paul Gunn or Coot Gunn, thus charging him in his true name. It is true, as stated by counsel for plaintiff in error in his brief, that Gunn and Green could not be treated as *idem sonans*, but it is easy to see how Green and Gunn might be mistaken for each other when written by one who wrote hastily, and whose handwriting was not plainly legible. The judge of the county court had the original writing before him, and, therefore, if the writing was hard to decipher, had a better opportunity of determining what was really written in the indictment than a reviewing court could possibly have. Evidently he adjudged the name of the accused, as written in the indictment, to be Gunn, and not Green; and, this being so, the plea of misnomer could not be sustained. Furthermore, the defendant admitted that he was apparently accused in his true name of Gunn, because he alleged that the indictment had been altered subsequently to its return into court by the grand jury. And, as further showing that the accused was charged in his true name, no matter if the writing was bad, or even if it had been altered, the clerk of the court, in transmitting a copy of the indictment to this court, puts the name of the defendant as Gunn, wherever it appears in the indictment. It is not suggested that the certified copy of the record is incorrect, and no motion is made here to correct it. We are therefore obliged to assume that the name of the defendant, as stated in the original indictment, appears so written therein that even if it is doubtful whether it is Gunn or Green, it can reasonably be interpreted to be Gunn, and

would ordinarily be read as Gunn, and not as Green. We can not tell from the record whether the plea of misnomer was submitted to the judge to pass upon the facts without the intervention of a jury, but, whether this is true or not, if it appears upon the face of the indictment that the accused was already charged in his true name, the judge did not err in passing upon the plea without submitting it. He should overrule it, as in the present instance, or decline to entertain it, and strike it. Passing by the alteration of the indictment alleged in the second ground of the demurrer, we hold, as to the first ground, that where a plea of misnomer is filed, and the merit of the plea (so far as concerns the verity of the statement that the defendant is charged by a name other than his true name) is dependent upon an inspection of the original indictment or other accusation, the decision of the trial judge, that the name in which the accused is charged in the indictment is the same as that which the defendant in his plea admits to be his true name, is final, where the writing in the indictment, though somewhat illegible or unintelligible, can reasonably be said to represent the true name of the accused.

2. It appears, from the recital of the petition for certiorari, which the county judge in his answer admitted to be true, that the solicitor admitted that the indictment did at one time read as follows: "charge and accuse Paul Gunn, alias Coot Gunn, with the offense of misdemeanor, for that the said Paul Green, alias Coot Green, did play and bet for money," etc., and that some one had changed it after it left the grand-jury room. The fact that extraneous evidence is required to support this second ground of the demurrer shows that the alleged defect or the alleged alteration of the indictment could not be reached by demurrer. A demurrer must necessarily be addressed to defects apparent upon the face of the pleadings as they are at the time the demurrer is filed, and must be addressed to the pleadings as they appear of file. The overruling of this ground of the demurrer by the judge of the county court could properly have been placed either upon the ground that the demurrer was speaking of something not apparent upon the face of the record (and certainly so if the original paper itself did not plainly show it had been altered), or upon the ground that the defendant should have presented the objection by plea in abatement.

3. The point of the petition for certiorari was that Paul Gunn had been convicted of gaming because Paul Green gambled, and counsel for the plaintiff in error, in his brief, says that it seems, if a conviction under this indictment is allowed to stand, that that would be the result reached. This point is not involved. It is admitted in the petition for certiorari that the evidence introduced made out a case of gaming against the defendant. Therefore only two questions were presented to the judge of the superior court, both of which were purely technical, and both of which, for the reasons stated above, were correctly decided. The demurrer could not reach the alteration in the indictment, if it was altered, and the reading of the indictment itself controlled the plea of misnomer.

Judgment affirmed.

3976. CONOLY v. THE STATE.

The defense of misadventure or accident being directly involved under the evidence, it was error to fail to instruct the jury upon this theory of defense, even without a written request.

DECIDED MARCH 19, 1912.

Accusation of assault and battery; from city court of Sylvester—
Judge Williamson. September 26, 1911.

Tison & Rice, for plaintiff in error.

W. E. Wooten, solicitor-general, *J. H. Tipton*, contra.

POTTLE, J. The accused was convicted of assault and battery. The State's main witness described the occurrence thus: "We was there in the house where I was ironing, and we were all talking and going on, and Floyd came there, and was playing; he had some whisky, and told them that if they would take it away from him they could have it. Some one took it away from him and ran away, and he ran after them, and he picked up the sugar dish and threwed it and hit me accidentally. He was not mad with me, and I had been living with him and his wife for a long time, and he had never mistreated me, and I was not mad with him or him with me, and this was purely accidental."

It is doubtful whether the evidence as a whole justified the conviction. The State's witness may have repented, as so frequently happens in this class of cases and among this character of our citizenry.

But whatever the truth may be, the accused was manifestly entitled to an instruction upon the law of misadventure or accident, and the failure to give him the benefit of this theory of defense demands a new trial

Judgment reversed.

3979. HAYS v. THE STATE.

1. The mandatory requirement of § 1056 of the Penal Code (1910) that, when requested by either party before argument begins, the judges shall "write out their charges and read them to the jury, and it shall be error to give any other or additional charge than that so written and read," is not complied with when in the charge as written there appears a notation as follows: "§ 1010, Code 1895, volume 3, read if statement made by defendant; erase if none." The charge, as given, not appearing in the record, and the evidence being conflicting, the failure to comply with this requirement of the statute demands a new trial.
2. The evidence being conflicting upon the question as to whether any offense was committed at the time and place alleged in the indictment, and whether, if so, the accused was the perpetrator, it was error to reject evidence that a person in the presence of the State's witness, who had identified the accused as the perpetrator of the offense, had been heard making inquiry as to the identity of the person who had used the profane language described in the indictment.
3. The law relative to circumstantial evidence should have been charged.
4. There was sufficient evidence to authorize the verdict, and except as above indicated, no material error was committed.

DECIDED MARCH 19, 1912.

Indictment for misdemeanor; from city court of Monticello—
Judge Thurman. January 10, 1912.

A. Y. Clement, for plaintiff in error.

Greene F. Johnson, solicitor, contra.

POTTLE, J. The accused was convicted of using profane language in the presence of a female. The evidence was sharply conflicting. The chief witness for the State testified that he was driving by a negro church in company with a young lady, and that as he passed the church the negro, who was one of a party of several, used the profane language set forth in the indictment. This witness further testified that he went within five or six feet of the accused, and, though the moon was not shining, the night was bright and the circumstances were such as to indicate that the accused must have known that the lady was in the buggy. Opposed to this

testimony was that of two white men who claimed to have been present at the time the language was alleged to have been used, and who testified positively that no such language was used by the accused:

1. Counsel for the accused requested the judge to reduce his charge to writing. The judge, in attempting to comply with this request, used a printed charge in which the following notation appeared: "§ 1010, Code 1895, volume 3, read if statement made by defendant; erase if none." It is contended that this was not a compliance with the mandatory requirement of the law that the charge be reduced to writing. A somewhat similar question was raised in the case of *Walker v. State*, 8 Ga. App. 214 (68 S. E. 873). There the charge, as in the present case, was reduced to writing, except that it contained a notation indicating that the judge had read to the jury an act under which the indictment was drawn, but this notation appeared in the charge as follows: "Acts 1907, page — through words 'in section 1039,' p. 82." It was held in that case that this was not a compliance with the requirement of the section which compels the judge to reduce his charge to writing when a request to that effect is duly made by the accused. In that case attention was called to the fact that the Supreme Court had previously ruled that the judge, instead of copying in his charge sections of the code which he submits to the jury, may read them verbatim to the jury, noting accurately in his charge the sections of the code so read. In this case, as in the *Walker* case, the charge was not sent up in the record, and we have no means of telling whether the judge actually read the section of the code noted in his charge or not. It appears that the defendant did make a statement in the case.

Section 1056 of the Penal Code (1910) provides that, when counsel for either party requests it before argument begins, the judges shall "write out their charges and read them to the jury, and it shall be error to give any other or additional charge than that so written and read." It is somewhat an extension of the mandatory requirement of this section to permit the judge to read a section of the code without copying it in his charge, simply noting in his charge the number of the section so read. But certainly, when the judge undertakes to comply with this statute by noting in the written charge sections of the code or statutes which he may read to

the jury, it must unequivocally appear, from the charge, that the sections were in fact read as noted. Here it is impossible to tell whether the judge read § 1010 of the Code of 1895 or not. It does appear that the defendant made a statement, and presumably the section was read to the jury, but the plain requirement of the statute is that the written charge shall show unequivocally, either verbatim or by reference, every instruction given to the jury; and, when this mandatory requirement of the statute has been violated, it is the duty of this court to direct a new trial in any case where the evidence is conflicting and a different result would have been authorized.

2. While one of the State's witnesses was on the stand, the accused offered to show that this witness, in company with two kinsmen, afterwards went back to the negro church on the same night for the purpose of ascertaining who had used the profane language, and that one of the persons accompanying the witness, in his presence, made inquiry at the church as to which one of the negroes had previously used the profane language described in the indictment. The court declined to admit this proof; and we think this was error. One of the defenses was that the accused was not the person who used the profane language, and it was sought to show that the State's witness had really not been able to identify the accused as the perpetrator of the offense. It was competent for the accused to show, if he could, that this witness for the State, on the same night on which the offense was alleged to have been committed, approached the accused and several other negroes at the church, and that one of these persons who accompanied the witness, in his presence, before charging the accused with the offense, inquired as to who had previously used the profane language when the witness had passed along in his buggy with the young lady.

3, 4. We think there was enough evidence to authorize a conviction. It is contended that there was no proof by the State that the language, if used, was used without provocation, or that the accused knew of the presence of the young lady. These things may be shown by circumstantial as well as by direct evidence, and there were sufficient facts and circumstances to justify the jury in finding both that the language was used by the accused without provocation and that he knew of the presence of the young lady in question. It is contended that the court should not have charged all of

§ 396 of the Penal Code of 1895, since the language described in the indictment was profane, and there was no charge that the accused had used opprobrious words or abusive language to another, tending to cause a breach of the peace. It would have been better not to read this entire section, and if it was read the court should have been careful to instruct the jury that only the latter part of the section was applicable to the charge made in the indictment, but his failure to do this is not reversible error. Complaint is also made that the court refused to give a certain instruction, requested in writing, in reference to the degree of proof required to authorize a conviction. As stated, the charge was not sent up with the record. The request referred to was pertinent and legal, and an instruction of the nature therein indicated should have been given. There was no direct proof that the accused knew of the presence of the young lady. There was some evidence that he could have seen her and probably did see her, but there was also evidence that the night was dark. This necessary element of the case depended upon circumstantial evidence, and the judge should have charged the law relative to that character of evidence. *Riley v. State*, 1 Ga. App. 651 (57 S. E. 1031).

Judgment reversed.

3981. LITTLE v. THE STATE.

HILL, C. J. 1. There was no abuse of discretion in refusing to stop the trial of the case and allow the attorney for the accused to procure the attendance of witnesses to meet the facts disclosed by the witnesses for the State.

2. No error of law appears and the evidence supports the verdict.

Judgment affirmed.

DECIDED MARCH 19, 1912.

Certiorari; from Putnam superior court—Judge J. B. Park. December 23, 1911.

W. T. Davidson, for plaintiff in error.

J. E. Pottle, solicitor-general, *S. T. Wingfield*, contra.

3990. DOWNER v. THE STATE.

1. The front porch of a dwelling-house covered by a roof is a part of the dwelling-house, and the larceny of property from the front porch is, in contemplation of law, a larceny from the dwelling-house.
2. There was sufficient evidence to show that the value of the property alleged to have been stolen exceeded \$50.
3. Where, during the trial of a criminal case, the jury were, by consent, allowed to disperse, and one of the jurors heard a conversation between a witness for the State and a third person, in which the accused was denounced by the witness as having stated a falsehood, in his statement to the jury, as to a material fact, this denunciation had presumptively an effect on the mind of the juror, detrimental to the accused; and this presumption was not fully rebutted by the affidavit of the juror that it did not influence his finding. In the interest of a fair and impartial trial and the finding of a verdict based solely on the evidence, unaffected by any extraneous circumstance, another trial should have been granted.
4. The other assignments of error are without merit.

DECIDED MARCH 19, 1912.

Indictment for larceny from house; from Elbert superior court—Judge Meadow. December 12, 1911.

Percy Middlebrooks, Donnelly Bennett, for plaintiff in error.

Thomas J. Brown, solicitor-general, contra.

HILL, C. J. John Downer was convicted of larceny from the house, the property stolen being a Columbia bicycle, which was left on the front porch of a dwelling-house by the owner and stolen therefrom at night. His motion for a new trial was overruled, and he brings error. A consideration of the general grounds is not necessary, since another trial will have to be granted on one of the special grounds.

1. It is contended by the plaintiff in error that there could be no legal conviction of larceny from the house, because the evidence discloses the fact that the property was not stolen from inside the house, but from the front porch of the dwelling-house, and that the evidence showed that this front porch, although inclosed by a roof and constituting a part of the dwelling-house, was not itself laterally inclosed. The point is without merit. The front porch of a house is a part of the house itself, and if property is taken from the front porch, where it was left by the owner, it is taken from the house, in the meaning of the statute. *Johnson v. State*, 2 Ga. App. 405 (58 S. E. 684). In the case of *Burge v. State*, 62 Ga. 17, a watch was left hanging on a front porch, which was covered by the

roof of the house, and the accused took it therefrom. It was held that this was larceny from the house. The case of *McCabe v. State*, 1 Ga. App. 719 (58 S. E. 277), relied on by the plaintiff in error, is distinguishable on the facts from the present case. In that case the property was stolen from a wharf or pier which had no lateral inclosure, although covered by a roof.

2. The indictment alleged that the property stolen was of the value of \$53.50. The evidence showed that the owner gave this amount for the property at wholesale, and that the retail value of the bicycle was from \$75 to \$80. It was also shown that the value of the bicycle when stolen exceeded \$50. This was sufficient proof on the question of value, and authorized the imposition of a felony sentence.

3. While the trial was in progress the jury were allowed to disperse; and it is shown that one of the jurors had a conversation with one of the witnesses for the State, as follows: Juror: "What is that negro, John Downer [referring to the defendant on trial], doing with your coat on?" The witness replied that he had traded him a watch for it, and that he (witness) met John Downer in the road in Hart county, and that John Downer had the bicycle that they were trying him for stealing, and John Downer was a liar when he said that he did not meet him. This juror, in the counter-showing made in reply to this statement, said that the conversation as detailed was not had with him, but was with another person, in his presence and hearing. The juror does not disclose the name of the person with whom the conversation took place in his hearing. This, however, is immaterial; for he admits that the conversation took place and that he heard this witness for the State denounce the defendant on trial as a liar in the statement which he had made to the jury. The juror states, in his affidavit, that the conversation in question did not influence him in making his verdict. We think, however, that it was impossible for the juror to know whether he was influenced by this statement or not. The only effect it could have had upon him was detrimental to the accused. In *Brown v. State*, 65 Ga. 332, it was held that the fact that persons discussed a case on trial near the jury was not ground for a new trial, where it appeared that the jury did not hear anything said that could have influenced their finding. Where a juror, charged with the duty of finding a verdict solely according to the evidence, hears

a conversation in which the statement by the accused to the jury is characterized as a falsehood, it can not be said that such characterization could not have tended to influence the juror to the injury of the accused. Presumptively it did so, and this presumption is too reasonable to be fully rebutted by a mere statement by the juror that it did not so influence him. While the evidence strongly supports the verdict of guilty, yet the accused is entitled, however strong the evidence may be against him, to a finding based solely and exclusively on the evidence, unaffected in any manner by extraneous matter. We are constrained, therefore, to hold that a new trial should have been granted on this ground.

4. The other assignments of error are without merit.

Judgment reversed.

4004. BAILEY v. THE STATE.

HILL, C. J. Where the evidence relied upon for a conviction is entirely circumstantial, it is the duty of the trial judge to charge the law fixing the standard of mental conviction in such cases, as laid down by section 1010 of the Penal Code (1910), whether requested to do so or not. *White v. State*, 4 Ga. App. 72 (60 S. E. 803), and citations.

Judgment reversed.

DECIDED MARCH 19, 1912.

Indictment for keeping lewd house; from Thomas superior court
—Judge Thomas. December 23, 1911.

Theodore Titus, for plaintiff in error.

J. A. Wilkes, solicitor-general, *Snodgrass & MacIntyre*, contra.

4013. CHILDS v. THE STATE.

HILL, C. J. 1. In cases of alleged arson, in the absence of evidence as to the cause of the burning, the law presumes that the fire was accidental, and the State must prove beyond a reasonable doubt the perpetration of the criminal act. *Ragland v. State*, 2 Ga. App. 492 (58 S. E. 689); *West v. State*, 6 Ga. App. 105 (64 S. E. 130).

2. It is well settled that the corpus delicti must be shown by evidence aliunde the confession or incriminatory admissions. *West v. State*, supra; *Boyd v. State*, 4 Ga. App. 58; *Allen v. State*, 4 Ga. App. 458 (61 S. E. 740); *Bines v. State*, 118 Ga. 320 (45 S. E. 376, 68 L. R. A. 33).

In the present case there was no evidence whatever tending to prove the arson, except admissions slightly incriminatory, and these admissions were inconclusive, and at most raised only a bare suspicion of guilt. The verdict was therefore without any evidence to support it, and was contrary to law.

Judgment reversed.

DECIDED MARCH 19, 1912.

Indictment for arson; from Henry superior court—Judge R. T. Daniel. January 12, 1912.

Brown & Brown, for plaintiff in error.

J. W. Wise, solicitor-general, contra.

3539. DANIEL *v.* PERSONS.

HILL, C. J. The controlling question of law raised by the record in this case having been certified by this court to the Supreme Court for instruction, and that court having decided this question adversely to the contention of the plaintiff in error and in accord with the judgment of the lower court (137 Ga. 826, 74 S. E. 260), and there remaining in the record no other question for decision by this court, the judgment is

Affirmed. Pottle, J., not presiding.

DECIDED APRIL 2, 1912.

Habeas corpus; from city court of Monticello—Judge Thurman. May 30, 1911.

Doyle Campbell, for plaintiff. *W. S. Florence*, for defendant.

3574. BRACEWELL *et al.* *v.* THE STATE.

RUSSELL, J. 1. When two or more persons were on trial for an affray (which occurred at a place where a congregation of people were assembled for Sunday-school purposes), and one of the defenses relied upon was that the defendants were repelling an unlawful assault and battery made upon them, it was erroneous for the judge to restrict the defendants, in the exercise of their right of self-defense, to the right only of defending against a felonious assault. Regardless of the character of the place, the defendants would have the right to protect themselves against an assault, or assault and battery, or even to resent the use of opprobrious words and abusive language, provided in so doing they did not exceed the proper measure of resistance.

2. The other assignments of error in regard to the charge of the court involve questions which are not likely to recur on a second trial. In so far as the instructions of the judge relative to the form of the jury's verdict are concerned, the exceptions are without merit.

Judgment reversed. Pottle, J., not presiding.

DECIDED APRIL 2, 1912.

Accusation of affray: from city court of Dublin—Judge Hawkins. June 2, 1911.

John R. Cooper, for plaintiff in error.

George B. Davis, solicitor, contra.

3646. HUNTER *v.* THE STATE.

1. The specific intent to kill is an essential ingredient of the offense of assault with intent to murder. The existence or non-existence of this intent is a matter of fact to be determined by the jury, from the evidence, and is not the subject of any legal presumption arising merely from a part of the evidence. The law will charge an evil-doer with all the natural consequences of his unlawful act which the act produces, but it does not impute to him by mere presumption an intention to add a consequence to his unlawful act which was not in fact produced.
2. The evidence, though circumstantial, fully authorized the conviction of the defendant.

DECIDED APRIL 2, 1912.

Indictment for assault with intent to murder; from Terrell superior court—Judge Worrill. July 15, 1911.

H. A. Wilkinson, *D. S. Griggs*, for plaintiff in error.

J. A. Laing, solicitor-general, *R. R. Arnold*, contra.

RUSSELL, J. The defendant was convicted of the offense of shooting at another, with a recommendation that he be punished as for a misdemeanor. The trial judge, as he had a right to do, disregarded the recommendation and sentenced the defendant to serve four years in the penitentiary, or in such other place as the Governor might direct. The defendant excepts to the refusal of a new trial. The motion for new trial is based upon the usual general grounds, and no complaint is made as to any of the judge's rulings or as to his instructions to the jury. The insistence of the defendant is that, admitting all the testimony for the State to be true, the circumstances in proof are not inconsistent with his innocence, and that for that reason the verdict is contrary to law, as being without evidence to support it. It is also urged that inasmuch as the evidence does not show that the weapon as used was likely to produce death, the defendant could not legally be convicted. Passing for the present the question as to the sufficiency of the evidence generally to warrant the conviction of the defendant, we will deal first with the contention that the de-

fendant should either have been convicted of assault with intent to murder or have been acquitted.

1. Upon review of the evidence, we are satisfied that the defendant might properly have been convicted of the statutory offense of shooting at another, although indicted for assault with intent to murder. One of the differences between assault with intent to murder and the offense of shooting at another is that, to authorize a conviction of assault with intent to murder, the evidence must satisfy the jury of the existence of a specific intent on the part of the accused to kill the person assaulted, whereas one may be guilty of the offense of shooting at another in any case where he assaults another with a firearm without intent to kill, but not in his own defense or under other circumstances of justification, as provided in the code. The very fact (referred to in the brief of counsel for plaintiff in error) that the evidence does not show that the weapon used was such as was likely to produce death may furnish the reason why the jury found the defendant in the case at bar guilty of shooting at another, instead of guilty of assault with intent to murder. The real issue in the case is as to the identity of the person who shot Will Reed. The jury in this case had first to determine who was the person who did the shooting, and then the grade of the offense, if they found an offense had been committed. In order to find the accused guilty of assault with intent to murder (there being no such presumption as arises in a case where death results), the jury had to find that a specific intent to kill existed in the mind of the party who made the assault. Besides the fact referred to by counsel for the plaintiff in error, that the evidence failed to disclose that the weapon with which the assault was made was one likely to produce death, the character of the wound and the kind of shot used both support the conclusion that there was not an intent to kill. Other evidence in the case lends color to the inference that it was perhaps the intent of Will Reed's assailant to frighten him away from his home by putting him in terror of his life. Certainly the plaintiff in error can not complain that, by reason of the State's failure to prove a specific intent to kill, he was only found guilty of shooting at another, when if this specific intent had been shown to the satisfaction of the jury, and beyond a reasonable doubt, the prisoner could have been subjected to the severer penalties imposed for assault with intent to murder. Con-

ceding that the evidence does not show a specific intent to kill, and that the fact that the weapon which was used was not shown to have been used in a manner likely to produce death would in some cases tend to show that on the contrary there was either no intention to kill, or a fixed intention not to kill, as ruled by Chief Justice Bleckley in *Gilbert v. State*, 90 Ga. 692 (16 S. E. 652), "without a specific intent to kill as charged in the indictment, the offense of assault with intent to murder can not be committed. The existence of such intent is a matter of fact to be determined by the jury from all the evidence before them, and not matter for legal inference or presumption from only a part of the evidence, or even from the whole of it."

2. The case against the accused depended wholly upon circumstantial evidence, but we think the circumstances were sufficiently conclusive to authorize the jury to find the defendant guilty, and to exclude any other reasonable supposition than that he was guilty. Of course, the credibility of the witnesses was a matter solely for the jury, and for that reason we can not consider the fact that the testimony of some of the witnesses may have been different upon the trial now under review from what it was on the prior investigation, which resulted in a mistrial; but, assuming, as we must, that the jury believed the witnesses who testified in behalf of the State, the hypothesis of the defendant's guilt reasonably excludes every other supposition.

The party who was assaulted was shot through a window after he had retired to his bed. He was wounded with number 7 shot, which were loaded in a shell and held in the shell with wadding. The gun was discharged close to the window, and set fire to the curtains. The defendant had worked for Reed, the party who was shot, and had been ordered from Reed's home on account of supposed intimacy with or advances to Reed's wife. The defendant knew exactly where Reed slept and the situation of his bed. He had threatened Reed with violence on more than one occasion, when Reed would complain of his attention to his wife. On the very day of the shooting the defendant borrowed a single-barrel shot-gun from one of the witnesses; from another he procured a shell which contained number 7 shot, and from a third witness he borrowed a mule. At the time of the shooting the defendant lived some miles from Reed's home, and one of the witnesses saw the

defendant go by his house on the mule the night of the shooting. When he borrowed the mule he stated that he intended to go in the opposite direction from that in which Reed lived, but, when the witness saw him, he was on the road towards Reed's house. Another witness saw the defendant shortly before the shot, about 150 yards from Reed's house, and upon the approach of this witness the defendant crossed the sidewalk and apparently attempted to conceal something. There was also testimony to the effect that tracks leading from the window where Reed was shot, to where the mule apparently had been tied, a short distance away, were made by the accused. These are the most salient circumstances. However, there are quite a number which would authorize the conclusion that the defendant shot the prosecutor in order to enjoy unmolested the society of the prosecutor's wife.

Judgment affirmed. Pottle, J., not presiding.

3670. PONDER v. THE STATE.

RUSSELL, J. The evidence in behalf of the State demanded a verdict finding the defendant guilty of murder, and under the defendant's statement he was fully justified in the homicide. There is no view of the evidence which authorized the submission of the issue of the defendant's guilt of voluntary manslaughter to the jury, and the court erred in instructing the jury upon the subject of voluntary manslaughter.

Judgment reversed. Pottle, J., not presiding.

DECIDED APRIL 2, 1912.

Conviction of manslaughter; from Screven superior court—Judge Rawlings. August 12, 1911.

J. W. Overstreet, for plaintiff in error.

Alfred Herrington, solicitor-general, *Hines & Jordan*, contra.

3713. DOWDELL v. THE STATE.

- RUSSELL, J. 1. The case is a close one upon the evidence, but the testimony in behalf of the State authorized the conviction of the accused.
2. There is nothing in the record that indicates that the judge was prejudiced or biased against the defendant so as to diminish in the slightest degree his right to a fair trial, or that he did not have a fair trial.
3. It not being manifest that W. H. Feagin was the prosecutor in the case, and the evidence not being sufficient to show that he was in fact

the prosecutor, it does not appear that the relationship of one of the jurors to Feagin was prejudicial to the accused.

4. The court's instructions to the jury upon the subject of alibi were free from error.
5. The excerpts from the charge of the court, when considered in connection with the charge as a whole, were correct, and fully presented every material issue involved in the trial.

Judgment affirmed. Pottle, J., not presiding.

DECIDED APRIL 2, 1912.

Accusation of sale of liquor; from city court of Americus—
Judge Hixon. August 12, 1911.

J. B. Hudson, L. J. Blalock, for plaintiff in error.

J. R. Williams, solicitor-general, contra.

3717. MACK v. THE STATE.

RUSSELL, J. 1. A judgment overruling a demurrer to an accusation should be excepted to directly by exceptions pendente lite, properly preserved in the record, or by exceptions in the final bill of exceptions, timely filed. It does not constitute a proper ground in a motion for a new trial. *Williams v. State*, 4 Ga. App. 853 (62 S. E. 525).

2. Grounds contained in an amendment to a motion for a new trial, not verified or approved by the trial judge, can not be considered by this court. *Soell v. State*, 4 Ga. App. 337 (61 S. E. 514); *Wilson v. Cobb*, 4 Ga. App. 272 (61 S. E. 133).

3. The evidence in support of the verdict is very weak and unsatisfactory, but this court can not say that the verdict is wholly unauthorized.

Judgment affirmed. Pottle, J., not presiding.

DECIDED APRIL 2, 1912.

Accusation of misdemeanor; from city court of Madison—Judge
Anderson. August 26, 1911.

Williford & Lambert, for plaintiff in error.

A. G. Foster, solicitor, contra.

3720. HARRIS v. THE STATE.

RUSSELL, J. As to fraudulent intent the evidence is not sufficient to authorize conviction. The case is controlled by the decision of this court in *Mulkey v. State*, 1 Ga. App. 521 (57 S. E. 1022).

Judgment reversed. Pottle, J., not presiding.

DECIDED APRIL 2, 1912.

Accusation of cheating and swindling; from city court of Madison—Judge Anderson. September 2, 1911.

Percy Middlebrooks, for plaintiff in error.

A. G. Foster, solicitor, contra.

3733. PARRISH v. THE STATE.

1. The motion for a new trial in this case having been heard and determined prior to the passage of the act regulating practice in courts of review, approved August 21, 1911 (Acts 1911, page 149), and the brief of evidence failing to disclose in what county the alleged offense was committed, and failing thus to show that the trial court had jurisdiction of the case, a new trial should have been granted. *Mill v. State*, 1 Ga. App. 134 (57 S. E. 969); *Gosha v. State*, 56 Ga. 36.
2. There is no merit in the complaint as to the exclusion of the testimony in relation to the conduct of the wife, or her ill-treatment of her husband. The conduct of the child's mother, or her refusal to live with its father as her husband, is no defense to a prosecution for abandonment of the child. The father must support his child, whether it lives with him or with the mother; and if he desires the custody of the child, he must pursue his remedy to obtain its custody.

DECIDED APRIL 2, 1912.

Accusation of abandonment of child; from city court of Reidsville—Judge Collins. August 2, 1911.

Way & Burkhalter, for plaintiff in error.

Robert E. DeLoach, solicitor, contra.

RUSSELL, J. 1. In so far as all of the special exceptions are concerned, the trial seems to have been free from error. But prior to the passage of the act regulating practice in courts of review, approved August 21, 1911 (Acts 1911, page 149), the venue being a jurisdictional fact, and required to be proved by the State as a part of the general case, it was uniformly held that failure to prove venue could be reached by a general assignment that the verdict was contrary to law and evidence, or contrary to evidence; and in the present record there is no proof to show in what county the alleged offense was committed. There is evidence that at one time the mother and father of the child lived at Collins, and that at another period they lived about a mile from Collins, and at another time about a mile and a half from Collins, but there is no evidence that the home of either was in Tattnall county; and there is, therefore, no evidence that the wife, either at the time the hus-

band abandoned her before the child was born, or (what is more material) at the time that the child was born, after the husband had abandoned her, resided in Tattnall county. In *Smith v. State*, 2 Ga. App. 414 (58 S. E. 549), the writer referred to the rulings in the cases of *Moye v. State*, 65 Ga. 754, and *Cooper v. State*, 106 Ga. 120 (32 S. E. 23), and adverted to some other rulings of the Supreme Court upon the subject of venue, and suggested legislation which would correct such an anomaly as the court's knowing that the town of Collins is in Tattnall county, and yet not being permitted, in a criminal case, to use its knowledge, in the absence of proof. In the present case, however, even if the court were permitted to take judicial cognizance of the fact that Collins is in Tattnall county, it can not be assumed that the residence of the defendant's mother-in-law, which is some distance from Collins, is still in Tattnall county. In this respect the record bears remarkable similarity to that in the *Gosha* case, *supra*. At the last session of the General Assembly the suggestion of this court was adopted, and it is provided, by the second section of the act to regulate procedure and practice in courts of review (Acts of 1911, p. 150), that "no judgment of a trial court in a criminal case shall be reversed by either the Supreme Court or the Court of Appeals for lack of proof of venue, or of the time of the commission of the offense, save where the particular point has been specifically raised by a ground of the original or amended motion for a new trial." In other words, the point can not be raised in a court of review, unless it is insisted on in the trial court. However, the judgment overruling the motion for new trial in the present case was rendered on August 2, 1911, and for that reason our decision must be controlled by previous rulings of this court and of the Supreme Court, holding that where the brief of the evidence contains no proof of the venue, a judgment refusing a new trial is erroneous, for the reason that, the venue being a jurisdictional fact required to be proved as a part of the general case, failure to prove venue could be reached by a general assignment that the verdict was contrary to law and evidence.

2. A new trial is granted in this case solely upon the ground stated; for it is not disputed that the defendant is the father of the child, nor is it denied that he has not contributed anything towards its support. It does not matter whether the defendant was

driven from home by his father-in-law or not, or whether his wife threatened to poison him, or attempted to shoot him. Even if it is necessary for the defendant to leave his wife as a matter of self-preservation, this will not relieve him from the duty of providing for the support of the child. And this means the care of the child in the custody of its mother, wherever she may be, and even while living apart from her husband, so long as she has the custody of the child. If the father can not properly provide for his child at the place where the mother lives, or if she should keep it at some other place, or if he desires the personal care of the child, he may himself obtain the custody of the child (if he be a more suitable person to be entrusted with its custody than its mother), but the child must be supported by its father, whether its mother has its custody or not. It is true that the abandonment which is penalized by law is voluntary abandonment, and it must appear that the father willingly withholds support from the child, but support and custody are not necessary concomitants. The father must support the child whether it lives with him or not. He is not relieved from that duty even though he justly fears so greatly for his life that he dare not live with the child's mother. As was held in *Moore v. State*, 1 Ga. App. 502 (57 S. E. 1016): "The conduct of the mother, or her refusal to live with the father, is no defense to a prosecution for abandonment of the child. The child is not responsible for such misconduct, nor is it to be abandoned by the father for that reason. While the father could, if he wished, live separately from his wife, or quit her altogether, for certain reasons, that has nothing whatever to do with the child, and in no way excuses him from his legal liability to care for his offspring. On the contrary, it is no defense, to a prosecution for abandonment of the child, that the mother has deserted the father, or even if she be guilty of the grossest immorality or unwifely conduct." Under this ruling it was not error to exclude the testimony of the defendant's mother to the effect that the defendant's wife drew a gun upon him and threatened to shoot him, and would have done so but for the fact that the witness took the gun away from her; and, for the same reason, the testimony which was admitted to show threats, on the part of the wife and mother, to poison her husband, as well as the testimony that the defendant's father-in-law drove him from his home with a shot-gun, was irrelevant and immaterial.

Judgment reversed. Pottle, J., not presiding.

3740. CAMPBELL v. ALKAHEST LYCEUM SYSTEM.

- HILL, C. J. 1. The written contract sued upon was complete and unambiguous and explicit as to terms. The presiding judge did not err in striking that portion of the answer which attempted to ingraft upon the express terms of the written contract, by parol, inconsistent terms and conditions. Civil Code (1910), § 5788; *Fleming v. Satterfield*, 4 Ga. App. 351 (61 S. E. 518).
2. The contract was signed in the name of the corporation, with the letters "L. S." affixed, intended as the seal of the corporation. The evidence showed that it was executed for the corporation by its president, who was authorized to make the contract for the corporation. Besides, the corporation was endeavoring to enforce it. There was no error in admitting the contract in evidence.
3. The evidence demanded the verdict as directed, and the writ of error is so clearly without merit that the judgment is affirmed and the motion for ten per cent. damages allowed.

Judgment affirmed, with damages.

DECIDED APRIL 2, 1912.

Complaint; from city court of Monroe—Judge Stone. August 19, 1911.

Walker & Roberts, for plaintiff in error.

Napier & Cox, contra.

3803. FLANDERS v. SAILORS.

POTTLE, J. There being evidence of some facts and circumstances sufficient to authorize a finding that the plaintiff was not a bona fide purchaser for value, before maturity, of the acceptance sued on, and it appearing that the defendant had paid all that the property for which the acceptance was given was worth, the plea of failure of consideration was not without evidence to support it, and the refusal of the judge of the superior court to set aside on certiorari the fourth consecutive verdict in favor of the defendant will not be disturbed, although there were minor errors committed during the trial in the magistrate's court.

Judgment affirmed.

DECIDED APRIL 2, 1912.

Certiorari; from Jackson superior court—Judge Brand. August 29, 1911.

A. C. Brown, for plaintiff. *P. Cooley*, for defendant.

3804. WILLIAMS v. ALLISON.

HILL, C. J. 1. The courts will take judicial cognizance of the computation of time, and of what days of the month are Sundays. *Dorough v. Equitable Mortgage Co.*, 118 Ga. 178 (45 S. E. 22).

2. A contract executed on Sunday, and which is connected with or relates to the business or work of the ordinary calling of one of the parties to the contract, and does not relate to work of necessity or charity, is invalid and can not be enforced. Penal Code (1910), § 416; *Thompson v. Williams*, 9 Ga. App. 367 (71 S. E. 678); *McAuliffe v. Vaughan*, 135 Ga. 852 (70 S. E. 322, 33 L. R. A. (N. S.) 255).
3. A contract made by the owner of real estate and personal property with a real-estate agent, placing the property in the hands of the agent to be sold, and fixing the commission to be paid to him and the terms of the sale, is a contract in connection with the ordinary calling or business of the real-estate agent, and, if executed on the Sabbath day, can not be enforced by the agent, although the contract may not have been made in the prosecution of the ordinary business or calling of the owner of the property. If the contract is executed in the prosecution of the ordinary business of either party thereto, and is executed on Sunday, it is invalid.

Judgment reversed.

DECIDED APRIL 2, 1912.

Complaint; from city court of Americus—Judge Hixon. September 16, 1911.

W. P. Wallis, H. E. Oxford, for plaintiff.

Ellis, Webb & Ellis, for defendant.

3844. SMITH v. THE STATE.

RUSSELL, J. 1. The excluded statement might have been admissible as part of the *res gestæ* of the transaction, if it had appeared that it was made at a time so nearly coincident with the shooting as to be free from the suspicion of device or afterthought, but the judge certifies that it did not definitely appear when the remark was made, and thus the ground of the motion for new trial complaining of the exclusion of testimony (not being approved by the trial judge upon the material point at issue) can not be considered.

2. There was evidence which authorized the jury to infer that there was an intent to fight on the part of the accused, as well as on the part of the deceased; and it was therefore not error for the court to instruct the jury upon the subject of voluntary manslaughter.
3. Inasmuch as the court charged the jury fully and fairly to the effect that they could not convict the defendant unless they were satisfied of his guilt beyond a reasonable doubt, that portion of the charge wherein the judge instructed them that "the State, however, is not required to demonstrate with mathematical accuracy and precision the guilt of the

accused; the State is only bound to show his guilt to a reasonable and a moral certainty, and if the State has done that in this case then it is your duty to convict the defendant," was not error. The judge's instructions upon the subject of reasonable doubt afford the defendant no ground for complaint. See *Norman v. State*, ante, 802 (74 S. E. 428).

Judgment affirmed. Pottle, J., not presiding.

DECIDED APRIL 2, 1912.

Indictment for murder; conviction of manslaughter; from Laurens superior court—Judge Martin. September 30, 1911.

S. W. Sturgis, for plaintiff in error.

E. D. Graham, solicitor-general, contra.

3855. GURLEY v. THE STATE.

The evidence, though circumstantial, authorized the conviction of the defendant; and the assignments of error as to the admission of testimony, and as to the argument of counsel for the State, are immaterial.

DECIDED APRIL 2, 1912.

Indictment for larceny from house; from Wilkes superior court—Judge Walker. October 20, 1911.

P. L. Smith, I. T. Irvin Jr., for plaintiff in error.

Thomas J. Brown, solicitor-general, *R. C. Norman*, contra.

RUSSELL, J. The plaintiff in error, Charlie D. Gurley, was indicted jointly with Pat Gurley for the offense of larceny from the house. The theft of \$200 in money and of an ancient German coin said to be worth \$400 was charged in the accusation. Charlie Gurley defended by proof of an alibi. The theft was alleged to have been committed on the night of May 12, and testimony was adduced to the effect that he was at a boarding-house in Elberton that night for supper and after supper, and was in his room at the boarding-house early the next morning. The distance from Elberton to the scene of the larceny was between 40 and 45 miles. The strongest incriminatory circumstance against the accused was his statement, a short time before the larceny, that he knew where there was \$1,000 in a trunk, and no one living in the house except a man and a woman. The evidence showed that the prosecutor and his sister lived alone in the house in which this larceny was committed, and kept their money in a trunk. It was also shown that the defendant Pat Gurley, who was a brother of the defendant Charlie Gurley, boarded with the prosecutor and was thoroughly familiar with the premises.

It was further shown that Charlie Gurley made a contradictory statement as to his presence in Wilkes county about the time of the larceny, having denied that he was in Wilkes county about that time. The State produced evidence to the effect that while the prosecutor and his sister were at supper, some one entered the room where the trunk containing the prosecutor's title deeds and other valuable papers, as well as his money, was kept, and carried out the trunk containing them. It was too dark that night to find the trunk, but on the next morning tracks were discovered which were similar to those made by the shoes of the accused, and, some distance down the road, the trunk, which had been broken open, was found. There was blood on the trunk, and it was shown that Charlie Gurley, about the same time, had a fresh wound upon his hand, which had bled. The evidence of his guilt was not conclusive, but we think the fact that the house was entered by one thoroughly familiar with the surroundings, the fact that the two brothers were together at different places about the time of the larceny, and that Pat Gurley fled and has not been arrested, taken in connection with the blood upon the trunk and the wound upon the hand of Charlie Gurley, are sufficient to authorize the inference of Charlie Gurley's guilt.

Exception is taken to the admission of testimony from the sheriff of Hart county, to the effect that he has been unable to locate or arrest the defendant Pat Gurley, the ground of objection being that this evidence was irrelevant and prejudicial, because Charlie Gurley alone was on trial. This ground of the motion is not fully approved by the court, and for that reason can not be considered.

In the motion for a new trial complaint is made that the judge permitted the counsel for the State to comment on some poetry written in the back of the guest register of the boarding-house. We fail to see the relevancy of this poetry in the back of the register, and think that counsel could properly have been required to discontinue the comments on it, but there is nothing in the assignment of error which enables us to judge of the nature of the comments, or to decide that they were injurious to the plaintiff in error. The comments may have been a mere matter of pleasantry, and consequently of no pith or moment in affecting the consideration of the jury.

There was no error in the charge of the court upon the subject

of the conflict in testimony. The court's statement, "If you find any conflict and you can not reconcile it so as to give effect to all the testimony presented, then you take the entire testimony, run over it, and glean from it the truth, and wherever you find the truth of the transaction to be between the charges in the indictment and the defendant's plea of not guilty, let it control, shape, and mould your verdict," is in accord with the true rule as to the jury's doubt where there is conflict in the testimony.

Judgment affirmed. Pottle, J., not presiding.

3864. NANCE v. PATTERSON *et al.*

Where a petition in due form was filed in a court having jurisdiction of the parties and of the subject-matter, but, by clerical omission, the petition was not addressed to any court, and the clerk of the court in which the petition was filed attached process thereto, and the same was duly served on the named defendant, and he appeared and made a motion to dismiss the petition, because not addressed to the court in which it was filed, and because the clerk was not authorized to attach the process, the petition was amendable by inserting therein the court in which it was filed and to which it was intended to be addressed.

DECIDED APRIL 2, 1912.

Complaint; from city court of Blakely—C. L. Glessner, judge pro hac vice. November 22, 1911.

Hawes, Pottle & Wright, for plaintiff.

HILL, C. J. The plaintiff sued upon an open account, and prayed process requiring the defendants to appear at the next term of the court, to answer the complaint. The petition was in due form, and was headed "Georgia, Early county," but was not directed to any court. The clerk of the city court of Blakely attached to the petition a process directed to the defendants, which was personally served on each of them, requiring them to be and appear at the city court of Blakely on the third Monday in October (the return day of the city court for the suit), to answer the plaintiff's demand. The defendants filed a motion to dismiss the suit, (1) because the petition was not directed to any court, and (2) because the clerk of the city court of Blakely was without any authority of law to attach to the petition the process requiring the defendants to be and appear at the city court of Blakely on the third Monday in October, and the city court of Blakely was

therefore without jurisdiction to try the case. Subject to the motion to dismiss, the defendants appeared and filed an answer at the appearance term. The plaintiff moved to amend the petition by alleging as follows: "Plaintiff brought said petition to the city court of Blakely and handed the same to the clerk of the court for filing therein. Said petition was filed in said court and process issued directing the defendants to answer said petition to the city court of Blakely, and an answer was accordingly filed by defendant in said court. Plaintiff, by leave of the court, amends his petition by addressing the same as follows: 'To the city court of Blakely.'" The presiding judge refused to allow the amendment, and the plaintiff excepted.

We hold that the court erred in refusing to allow the amendment. The omission to address the petition to the court in which it was filed was manifestly a clerical error. The clerk was authorized to attach a process to the petition, addressed to the named defendants therein. *Judgment reversed. Pottle, J., disqualified.*

3891. HUTSON v. SUTTON.

POTTE, J. 1. This being an exception to a judgment refusing to sanction a petition for certiorari, complaining of a verdict in a justice's court, adverse to the plaintiff in a lien foreclosure proceeding, and the case being argued in this court by both sides upon the theory that one of the contested issues was whether or not demand for payment was made before the institution of the proceeding, the case will be dealt with as though a counter-affidavit was duly filed, denying that such demand was made.

2. There being some evidence that demand for payment was not made on the defendant before the foreclosure proceeding was instituted, and the case not being one where failure to make demand is excused, the judgment refusing to sanction the petition for certiorari will not be reversed, irrespective of other questions made in the record. Testimony by the defendant during the trial, that if demand had been made payment would have been refused, will not dispense with proof of demand. Civil Code (1910), § 3366; *Shealey v. Livingston*, 8 Ga. App. 642 (3). (70 S. E. 100). *Judgment affirmed.*

DECIDED APRIL 2, 1912.

Certiorari; from Berrien superior court—Judge Thomas. November 20, 1911.

J. B. Murrow, J. J. Murray, for plaintiff.

Hendricks & Christian, for defendant.

3898. McDONALD *et al.* v. BUTLER *et al.*

1. A municipal corporation is not liable in damages for a trespass committed by its officers in wrongfully disinterring and removing the remains of a person buried in a cemetery owned and controlled by the city, unless the act was performed in pursuance of and to effectuate some corporate power conferred by the municipal charter.
2. "One who is the owner of the easement of burial in a cemetery lot, or who is rightfully in possession of the same, is entitled to recover damages from any one who wrongfully enters upon such lot and disinters the remains of persons buried therein;" and where the trespass has been wanton and malicious, or is the result of gross negligence or a reckless disregard of the rights of those entitled to sue, equivalent to an intentional violation of them, exemplary damages may be awarded.
3. The value of an easement of burial may be recovered from one who wrongfully deprives the owner of his right of user. An action to recover as damages the value of such an easement will lie against one who wrongfully disinters the body of one buried by the owner, and causes to be interred in its place, without the consent of the owner, the remains of a stranger to him.
4. Where a corpse is wrongfully disinterred, one upon whom rests the duty of reinterment may recover from the wrong-doer the expense thereby incurred.
5. The special demurrers were properly overruled.

DECIDED APRIL 2, 1912.

Action for damages; from city court of Madison—Judge Anderson. November 16, 1911.

The action was against E. W. Butler and the mayor and council of Madison, as joint tort-feasors. The petition, as amended, set forth the following facts: On April 7, 1893, plaintiffs bought from Butler, then mayor of Madison, and the mayor and council, a lot in a cemetery owned by the City of Madison, to be used as a family burying ground, and received a deed thereto. On April 8, 1893, plaintiffs interred the remains of their father in the lot, and shortly thereafter moved away from Madison. Upon their return on a visit in 1910 they found that their cemetery lot "had been sacrilegiously raided, the remains of their father ruthlessly taken without warrant, by alien hands, from the home bought and paid for by his own loved ones, and where loved ones had lain him to rest, placed in a rough box, and dumped in a hole in some out-of-the-way place, all of which was done by the said E. W. Butler and his agent, and the mayor and city council of Madison, all without warrant, cause, or authority." The defendants were not only guilty of the acts above recited, but they likewise took

possession of the lot and sold it to another, and the remains of a stranger, not connected in any way with plaintiffs, now rest thereon. This conduct of the defendants was "without warrant, cause, or justification." On November 11, 1910, written demand for compensation was served upon the mayor and council of Madison, the claim being in the following language: "Madison, Georgia, November 11, 1910. To the Hon. Mayor and City Council of Madison, Georgia. Gentlemen: This is to notify you that J. W. McDonald and C. F. McDonald hold, present, and ask settlement of the following claims and demand, jointly due by you and E. W. Butler to said claimants: City of Madison, Madison, Georgia, the honorable Mayor and City Council of the City of Madison, and E. W. Butler, to J. W. McDonald and C. F. McDonald, debtor, 1909, April. To one cemetery lot lying in the new cemetery in the said City of Madison, known and distinguished in the said cemetery as lot number 26, on the Fourth avenue, in section first, a plat of new cemetery as here referred to as being of record in book PP, folio 32, in the office of the superior court of Morgan county, Georgia, of the value of \$100.00. To the expense of another lot, necessary for the purpose of reintering the remains of their father, which were removed from the aforesaid lot and cast out in the rubbish or put in an out-of-the-way place, expense of \$100.00. To cost of coffin, grave, and reintering the remains of their father, which were removed from the aforesaid lot and cast out, expense of \$125.00. March, 1910, to damage for disturbing and removing the remains of applicants' father from the aforesaid cemetery lot, and for desecrating the grave of their said father. and for taking said remains of their said father from the aforesaid cemetery lot and dumping them out elsewhere, the sum of \$4,675.00, a total of \$5,000.00. This notice is given pursuant to the act of the legislature of Georgia, approved on December 20, 1899." This account is made a part of the petition, and judgment prayed against the defendants for each and every item as charged in said account. The injury to plaintiffs' feelings has continued up to the filing of the suit. Punitive and exemplary damages are claimed "by reason of the act and intention, and of the gross, wanton, reckless, cruel conduct of the defendants," above described. The defendants demurred, generally and specially; the demurrers were sustained, and the plaintiffs excepted.

Williford & Lambert, for plaintiffs.

E. H. George, Samuel H. Sibley, for defendants.

POTTLE, J. 1. It needs little argument to show that the city is not liable for exemplary or punitive damages for the alleged conduct of its officers in desecrating the grave and disinterring the remains of the plaintiffs' father. Even if authority to remove the bodies of deceased persons from their resting places could be conferred upon a municipal corporation as a legitimate exercise of the police power, the General Assembly has not attempted to expressly confer such authority upon the City of Madison, and it will not be implied from the general welfare clause in the city's charter, or from the authority, granted in an amendment to the charter, to own and regulate cemeteries and interments therein. Acts 1906, p. 837. The alleged conduct of the members of the council was ultra vires and wholly beyond the scope of their official duty. The trespass was not the result of an exercise of corporate powers, and the corporation would not be liable even though its governing body commanded the performance of the act. In such a case the corporation is not estopped to plead the want of corporate power. The rule is succinctly stated by the Supreme Court as follows: "Where an act is done by the officers and agents of a municipal corporation, which is within the corporate power and might have been lawfully accomplished had the municipal authorities proceeded according to law, the corporation will be liable for the consequences of an act of such officers or agents proceeding contrary to law or in an irregular manner. Aliter, where the act complained of lies wholly outside of the general or special powers of the corporation." *Langley v. Augusta*, 118 Ga. 590 (4), (45 S. E. 486, 98 Am. St. R. 133). See also *Roughton v. Atlanta*, 113 Ga. 948 (113 S. E. 64); *City Council of Augusta v. Mackey*, 113 Ga. 64 (38 S. E. 339); *Gray v. Griffin*, 111 Ga. 361 (36 S. E. 792, 51 L. R. A. 131); Civil Code (1910), §§ 893, 897; 4 Diffon, Mun. Corp. (5th ed.), § 1650 et seq. It is argued that since the city sold the cemetery lot and thus gave colorable authority to the grantee to remove the body of the plaintiffs' father, it ought to be liable for the natural consequences of its act in making the deed; but this position is not tenable. We need not discuss the question whether the city had in 1893 power under its charter to lay out and own a cemetery. Certainly the mere grant

of an easement of burial in a cemetery lot would not make the corporation liable for exemplary or punitive damages for the act of the grantee or of officers of the city in disinterring and removing from the lot the remains of one previously buried there. No act of its governing body could make it liable for such a trespass. The act of making the second sale of the lot was within the corporate power, but the unlawful trespass was not so connected with, or the consequence of, the lawful act as to render the city liable for the tort. Since all of the items of damage claimed were traceable to and grew out of the trespass in disinterring and removing the body, the general demurrer of the city was rightly sustained.

2. As to Butler, the petition stated a case. His counsel do not contest the correctness of the principle decided in *Jacobus v. Children of Israel*, 107 Ga. 518 (33 S. E. 853, 73 Am. St. R. 141), that "one who is the owner of the easement of burial in a cemetery lot, or who is rightfully in possession of the same, is entitled to recover damages from any one who wrongfully enters upon such lot and disinters the remains of persons buried therein." See, also, *Wright v. Hollywood Cemetery Corporation*, 112 Ga. 884 (38 S. E. 94, 52 L. R. A. 621); *L. & N. R. Co. v. Wilson*, 123 Ga. 62 (51 S. E. 24, 3 Ann. Cas. 128); *Medical College v. Rushing*, 1 Ga. App. 468 (57 S. E. 1083). His point is that only special damages are laid, and that, there being no claim for general damages, the petition was rightly dismissed as to Butler, because the allegations are not sufficient to support the claim for exemplary or punitive damages. See *Wright v. Smith*, 128 Ga. 432 (57 S. E. 684). The authorities cited in the *Jacobus* case show the rule to be that damages may be recovered where the act of disinterment was done either wantonly or negligently. Mere negligence will authorize the recovery of general damages. But in order to authorize the recovery of exemplary damages, it must appear that the "injury has been wanton and malicious, or is the result of gross negligence or a reckless disregard of the rights of others, equivalent to an intentional violation of them." *Jacobus v. Children of Israel*, supra. Where there are aggravating circumstances, either in the act or the intention, punitive damages may be awarded. Civil Code (1910), § 4503. There is no prayer for general damages, but the averments sufficiently state a case entitling plaintiffs to recover exemplary or punitive damages. It is true the petition does not allege

in terms that the act was wilfully done; but it does allege that Butler himself, as mayor, executed the deed to the plaintiffs; that he and others ruthlessly and without warrant of law desecrated the grave, took the remains therefrom, placed them in a rough box, and "dumped" them into a hole in an out-of-the-way place; that he and the other defendants sold and delivered possession of the lot to another person, who interred therein the body of a stranger to plaintiffs. The law is not over-particular about what a thing is called. From the facts pleaded the law will presume that the act was wilful and wanton, and done with a reckless disregard of the rights of the plaintiffs. In addition to this, there is a sufficient averment of aggravating circumstances, both in the act and in the intention, to authorize the imposition of punitive damages. The mere absence of a headstone or monument would not excuse the desecration of the grave. When it was discovered, no matter how, that a human body had been interred on the lot, the grave should have been held sacred and the body allowed to remain undisturbed in its last resting place. Certainly, upon discovery of the grave, the most diligent and searching inquiry should have been made, to discover ownership of the lot and the identity of the person whose remains lay buried there. Nor would the mere fact of the apparent abandonment of the lot justify the ruthless invasion of the sacred precincts of the grave. Neglect of a child, though never so gross, to care for the grave of his parent will not excuse one who wantonly or negligently disinters the corpse and removes it elsewhere. The law recognizes and holds sacred that respect which all natural persons are presumed to have for the memory of the dead; and when the feelings of a child have been wounded in the manner described in the petition, damages will be awarded. We have no means of knowing what the truth is. Of course, if there has been an honest mistake, and no malice and no gross negligence, and no such reckless disregard of the rights of the plaintiffs as would be equivalent to an intentional violation of them, they would not be entitled to recover exemplary or punitive damages. These are questions to be decided upon the coming in of the evidence. The defendant has not been heard. If the real truth be as stated in the brief of his counsel, a very different case will be presented.

3. The claim for compensation for the value of the lot taken from plaintiffs was demurred to, upon the ground that, as the

plaintiffs still own the lot, they can not recover its value. Tortious deprivation of land, where the owner has the fee in the soil, will not give rise to an action sounding in tort, to recover as damages the value of the land; because ejectment lies to recover the land, and a double recovery of the land and its value would not be allowable. But where an easement of mere right of user has been destroyed, the owner can not maintain ejectment. *Stewart v. Garrett*, 119 Ga. 386 (46 S. E. 427, 64 L. R. A. 99, 100 Am. St. R. 179); *Powell, Actions for Land*, § 50. His only remedy is in tort, where the measure of damages will be the value of the easement. Here the lot remains, but the body of a stranger to plaintiffs reposes there. No one with proper respect for the memory of a deceased loved one would care to lay his remains beside those of an alien in blood. The law will not require plaintiffs, in order to obtain the full enjoyment of their easement of burial, to commit an act similar to that which the defendants are alleged to have performed. Their easement is lost to them, as they say, by the conduct of the defendants. The plaintiffs bought and paid for the lot, and those who wrongfully deprived them of their right to its full and complete enjoyment ought to pay whatever the easement may be shown to have been worth at its fair market value. Of course, if Butler was in no way concerned with the interment of the body of the stranger to the plaintiffs, this item of damage could not be recovered from him.

4. The defendants specially demurred to the claim for the cost of reinterment of the body of the plaintiffs' father, upon the ground that it was not alleged that the plaintiffs actually expended the amount sued for. If the plaintiffs did not themselves incur this expense, they can not recover for these items, but we think the petition sufficiently alleges that they did so. The averment that defendants are indebted to plaintiffs for the "expense of another lot," in the sum of \$100, and for the "cost of coffin, grave, and reinterment of the remains of their father" at an "expense of \$125.00," is equivalent to an allegation that plaintiffs incurred the expense claimed.

5. There was no misjoinder of causes of action. There was but one cause of action alleged, namely, the wrongful disinterment of the dead body; and the several items of damage sought to be recovered relate to different elements growing out of and conse-

quent upon the tort. The allegation in reference to the continuance of the tort was simply an averment that plaintiffs' feelings were still wounded and they continued to suffer mortification and humiliation. If the facts stated in the petition be true, time will never wholly heal the wounded feelings of the children of him whose grave was desecrated in the manner described in the petition. The demurrer of course admits these facts.

The judgment will be affirmed in so far as it dismissed the petition as to the city, but reversed in so far as it sustained the demurrer filed by Butler.

Judgment affirmed in part, and in part reversed.

4001. CARTER *et al.* v. THE STATE.

HILL, C. J. 1. To ask the counsel engaged in the trial of a criminal case, in the hearing of the jury, if they will consent to a separation of the jury pending the trial, is bad practice; its tendency being to deprive one or the other of the parties of the free exercise of his will or judgment on the subject. If, however, counsel for the State and counsel for the accused both consent to the separation, the latter will not be heard to move for a mistrial on the following morning, when the jury reassembles, on the ground that the request made by the judge before the jury was an improper coercion of counsel's will, and deprived him of the free exercise of his judgment, and prevented the accused from having a fair and impartial trial. *Sullivan v. Padrosa*, 122 Ga. 339 (50 S. E. 142); *O'Dell v. State*, 120 Ga. 152 (47 S. E. 577).

2. No material error of law appears in the conduct of the trial, though some of the excerpts from the charge of the court, to which exception is taken, are not entirely satisfactory. The case on the facts is very weak, but there is some slight evidence to sustain the verdict, and this court can not interfere.

Judgment affirmed.

DECIDED APRIL 2, 1912.

Accusation of assault and battery; from city court of Millen—
Judge Milton. January 17, 1912.

James R. Thomas, for plaintiffs in error.

S. F. Memory, solicitor, contra.

3327. TAYLOR *et al.*, trustees, v. MATTHEWS *et al.*

1. The trustees of the school districts created under the provisions of § 1531 of the Political Code (1910) are empowered to make contracts in relation to school matters, and to acquire and hold any other property for school purposes, and are invested with capacity to sue and be sued, where their rights or liabilities as school trustees are involved.
2. In the absence of express legislation to the contrary, sound public policy requires that the exercise by the board of trustees of a school district of its discretion as to the expenditure of funds raised by taxes from the citizens of the district for educational purposes should not be interfered with or controlled, unless there is a manifest abuse of discretion, or an expenditure of the funds for some purpose wholly disconnected therefrom.
3. School funds derived from local taxation within a school district may properly be expended by the trustees of the district in protecting or preserving the right of local taxation for educational purposes, by the employment of an attorney, or in other legitimate expenses, necessary for presenting their rights in the adjudication of the case.
4. It is within the power of trustees of any school district in this State to provide means by which all children of school age in that district may receive the benefit of the school fund belonging to the district. And to that end they may either contract with the trustees of an adjoining school district for the payment of the tuition of non-resident pupils to themselves, or agree to pay to the trustees of an adjoining school district, whether in the same or in an adjoining county, the tuition of resident pupils when they determine that these pupils can more advantageously or conveniently attend the school of the adjoining district than the school of the district in which they reside.
5. The title to public-school money paid into the hands of trustees of a school district while local taxation for school purposes was in force is unaffected by the fact that the local-tax law was thereafter repealed or abolished by the provisions of § 1536 of the Political Code (1910).
6. The judgment was authorized by the evidence.

Action on bond; from city court of Carrollton—Judge Beall.
March 14, 1911.

Taylor and Brooks, as trustees of Wesley Chapel school district in Carroll county sued Matthews as principal, and Griffin as surety, on a bond given by Matthews as treasurer of a former board of trustees of the school district. The petition alleged a breach of the bond, and a consequent indebtedness to the petitioners as trustees, in the sum of \$106.35, with interest, by reason of the fact that Matthews, as treasurer, had failed to turn over to his successor in office, or fully account for, that amount of the funds entrusted to him. It alleged that the sum sued for was paid out illegally, in that Matthews paid from the school fund \$50 to an attorney, as

a fee for resisting proposed legislation affecting Wesley Chapel school district, \$6.35 for railroad fare and expenses of certain persons coming to Atlanta to resist the proposed legislation, and \$50 to a teacher whose school was in Paulding county, for teaching children who resided in Wesley Chapel school district. The bond of Matthews as treasurer contained the condition that, "whereas the said obligees [J. W. Brooks, W. E. Smith, and G. S. Matthews, as trustees of the Wesley Chapel local-tax school district] elected said Matthews, principal, treasurer of said board of trustees, now, should he fully discharge the duties of said office and faithfully account to said obligees for all funds coming into his hands as treasurer, and return such as may be in hand when his term expires to his successor, then this bond to be void, otherwise of full force and effect."

Matthews pleaded that he had fully discharged his duties as treasurer, and had fully accounted to the proper authorities for all money received. He admitted the payment of the attorney's fee of \$50, and defended upon the ground that the payment was in pursuance of a contract made with the attorney by his associates and himself as trustees, under the following circumstances: "The people of said district had voted the local-tax law in, and the trustees had successfully resisted their efforts to set aside the law in the courts, by securing a decision in favor of the school in the Supreme Court, Mr. Holderness being of counsel for said trustees in said litigation; and the movants in said litigation then proposed to have passed by the Georgia legislature a local bill, which was drafted and presented to the proper committee, abolishing the school district, and he was employed by the board to make an argument on the constitutionality of said bill before a house committee. The committee took the view he presented and killed the bill." As to the payment of the \$6.35 the defendants pleaded, that "the trustees thought that said legislation was vicious. They knew that quite a number of people would testify before said committee in favor of the bill. Therefore it was suggested by the board that Mr. Matthews, Mr. Smith, and Professor Ira Williams should also appear before said committee, which they did, and the actual expenses of said trip be charged; all of which was in the interest of the school as they conceived it. After the killing of the bill the defendant Matthews was directed by the president of the

board to issue a draft in favor of Mr. Holderness, and to issue a draft covering the expenses of the said parties who testified before said committee. They plead and insist that the same was in the interest of the school and insist that they had a legal right to make such an expenditure for the protection of the school interests of said district." The defendants admitted also that Matthews paid \$50 to J. R. Cole, teacher of the county of Paulding, in settlement of the tuition of children living in Wesley Chapel school district who attended the Cole school, but pleaded, as justification of his action, that he was instructed by the county board of education of Carroll county to make the payment. It was further pleaded that at the time a settlement was demanded of Matthews by Taylor, one of the plaintiff trustees, an election had been held which had resulted against local taxation, the election being held in December, 1909, and Taylor not being commissioned by the county board of education until January 6, 1910; also that after the repeal of the local-tax law the trustees of the school district had no right to receive the funds in the hands of Matthews, but that the county board of education of Carroll county alone had the right to receive the funds in his hands, and that Matthews made a full and complete settlement with the county board. It was also pleaded that before making the settlement with the county board of education Matthews consulted the attorney-general and the State school commissioner, and was directed to settle with the county board of education of Carroll county, and required by law not to settle with Taylor, and that in the settlement with the county board the authority of the trustees of the school district to employ counsel and send witnesses before the legislative committee to testify in behalf of the school was recognized.

The bond signed by Matthews was put in evidence, and the case was submitted to the decision of the trial judge, without the intervention of a jury, upon the following agreed statement of facts:

"Plaintiffs in this case are the only trustees of Wesley Chapel school district in said county. J. F. Brooks was elected and qualified as such trustee in December, 1908; W. A. Taylor was elected in December, 1909, and qualified in February, 1910. J. F. Brooks succeeded J. W. Brooks as trustee. Taylor succeeded G. S. Matthews. W. E. Smith was third trustee and resigned after Taylor qualified. No successor has been elected. On December 12, 1907,

J. W. Brooks, G. S. Matthews, and W. E. Smith were trustees of said local school district. Previous thereto said Matthews was elected secretary and treasurer of said board, and executed and delivered the bond sued on on December 12, 1907, with M. E. Griffin as security. On July 27, 1908, said Matthews paid out of the funds in his hands, as secretary and treasurer, \$6.35, railroad fare to Atlanta and return, for three men to testify before a house committee in behalf of the school, in resisting a local bill affecting said school district, looking to the abolishment of local tax; also, March 11, 1909, paid S. Holderness out of said funds \$50, for appearing before said legislative committee in opposition to said local bill, he having advised that said local bill was unconstitutional. The bill did not pass. On January 3, 1910, said Matthews, as said treasurer, paid out of said fund to J. R. Cole, a teacher of Paulding county, \$50, for teaching the pupils of Wesley Chapel school district attending said Cole's school in Paulding county, in pursuance of the following order of the county board of education: 'December 28, 1908. The trustees of Wesley Chapel local-tax school district and some of the citizens of said district appeared before the board, asking that this board relieve the situation in said district by cutting the lines in said district or recommending the paying of teachers in other contiguous schools the pro rata part of the school fund for said pupils, or the location of another school in said district. Upon consideration this board of education recommend that the local trustees of Wesley Chapel local district transfer such pupils as are too inconveniently situated to attend the Wesley Chapel school to such other schools as they may see proper, paying for same out of the appropriations made by the board of education to said district and out of the local tax collected in said district.' The \$6.35 above referred to was paid by order of the majority of the local board of trustees, J. W. Brooks being absent. The said \$50 paid S. Holderness was paid in pursuance of a contract made by a majority of the local board of trustees, Brooks not being present. On the 1st day of February, 1910, J. F. Brooks as treasurer of said local board, demanded the aforesaid sums of money of said G. S. Matthews, and he refused to pay the same to him. Prior to said demand said J. F. Brooks had been elected secretary and treasurer, and qualified as such by giving bond. On December 7, 1909, there was an election held in said district on

the question as to whether or not local tax should continue or be abolished, which resulted in the abolition of local tax for said district. On the 17th of February, 1910, the board of education of Carroll county authorized the county school commissioner to have a settlement with G. S. Matthews, treasurer of said local-tax school district, and to take charge of such funds as may be in his hands as such treasurer, and also to receive as such county school commissioner such funds as may be in the hands of M. E. Griffin, tax collector, of local tax collected by him and now in his hands; this action taken in pursuance of a ruling of the attorney-general. On February 26, 1910, in pursuance of said action of said county board of education, J. S. Travis, as county school commissioner, had a settlement with the said G. S. Matthews, as said treasurer, and approved his accounts, paying out said items, receiving from him \$62.47, and receipting him in full for all funds in his hands as treasurer."

The court rendered judgment in favor of the defendants, and the plaintiffs assign error upon the judgment.

W. F. Brown, C. E. Roop, for plaintiffs.

S. Holderness, for defendants.

RUSSELL, J. (After stating the foregoing facts.)

1. Under the pleadings and the evidence, the first question which arises is as to the power of the trustees of a school district, and especially as to their power and authority to bring a suit. We deal with this phase of the case first, because the defendants in their plea question the right of the present trustees to pursue the instant action, and also because it seems to us that if the trustees of the school districts, provided for by law, can employ counsel and maintain an action brought upon a breach of their treasurer's bond, perhaps the trustees of the same district would be authorized, in their discretion, to employ counsel to invoke the protection of their rights in another proceeding and in a different forum, and even to appear before a legislative committee in opposition to proposed legislation directly affecting the trust with the preservation and administration of which the trustees are charged. By the terms of the Political Code (1910), §§ 1531, 1532, 1533, provision is made for the creation of school districts, into which the law requires each county to be subdivided; for the election of three trustees for each school district, and for the

election of a secretary and treasurer, who must be a member; and § 1537 prescribes the powers and duties of the trustees and of the secretary. Some of the duties of the trustees are specifically defined in the code, but many of their duties and powers must be implied from the nature of the office and the trust imposed upon them. In the absence of an express definition of their powers, or of any limitation upon them in the statute, it must be assumed that there is an implied grant of enough power to enable these trustees to discharge the duties and effectuate the trust imposed upon them. This view has been taken in other jurisdictions. The trustees of school districts are generally vested with the power of making contracts in relation to school matters. They have been empowered by statute, in this State, to borrow money for certain purposes, and usually they have power to acquire and hold land and other property for school purposes, and are invested with capacity to sue and be sued, where the rights of their trust are involved. 25 Am. & Eng. Enc. Law (2d ed.), 44, 45, and citations. We may remark, in passing, that the right of the plaintiffs to bring the present suit depends upon the assertion of this principle.

2. It is apparent, from consideration of the various sections of the code which deal with the organization and administration of our public-school system that it was the intention of the legislature to deal with the subject in a broad, general way, leaving matters of detail largely to the discretion of those specially charged with the conduct of our public-school system. (See Political Code (1910), title 11, chapter 4, article 9, which article deals with the formation of school districts, the election of trustees, and the levy of local tax for public schools, both by counties and by school districts.) It is declared, in § 1545, that "it is the purpose and spirit of this Article to encourage individual action and local self-help upon the part of the school districts," but "it is expressly understood that the general school laws of this State as administered by the county board of education shall be observed." We apprehend this section to mean that as the county board of education is subordinate to the State board of education and to the State commissioner of education, who is its chief executive officer, so the authorities of a school district laid out according to law are to be subordinate to the regulations of the county board of education, and, nevertheless, individual action and local self-help on the part of the school dis-

strict is to be given the fullest recognition by those charged with administration of our public-school system who are superior in authority to the school-district authorities. Naturally this would call for an application of very liberal rules when the exercise of the discretion of the local board in the expenditure of the funds entrusted to them is to be reviewed. Of course, the expenditure of school money for any purposes foreign to the school and not connected with its maintenance would be contrary to law. On the other hand, occasions might arise in which the interest of the school would be subserved by the use of a portion of its funds for other purposes than the mere payment of its teachers or even the building or repairing of schoolhouses. The safety of funds already in hand might be involved, or the power to raise any funds in the future might be threatened. In such case it can not be said that any expense necessary to preserve unimpaired the trust delegated could not be properly made by the school trustees from the school funds. To hold otherwise would be to say that in a supposable case those who are charged with the administration of the school interest of a school district must stand idly by and lose all, for want of power to save their rights by the use of those means which must be employed by others under similar circumstances. In the absence of express legislation to the contrary, sound public policy requires that the exercise by the board of trustees of a school district of its discretion as to the expenditure of the funds raised by taxes from the citizens of the district should not be controlled or interfered with, unless there is a manifest abuse of discretion, or unless funds raised by taxation for educational purposes are expended for some purpose wholly disconnected therefrom.

3. It would seem to be implied, from the language used in § 1547, that it is the policy of the State to encourage individual action and local self-help in the school districts; and this can best be done by allowing the greatest possible freedom of action on the part of the local trustees, especially in the expenditure of funds raised by local taxation. It would seem to be in consonance with the spirit of our institutions to allow the chosen representatives of those who paid the local tax to control the disposition of the funds, with the single reservation that the money thus raised by taxation must be expended in the maintenance of a local school for whose support it was designed by the voters. It is true that

public-school money is a trust fund, and can not be applied except for educational purposes, but it would never do to give so strict a construction to this language as to confine the expenditure to the payment of teachers, and nothing else. All language is to be given a construction which will effectuate the purpose sought to be accomplished; and so, while money raised for the maintenance of a public school may in one sense be said to be money raised for educational purposes, it is not raised for all educational purposes, but only for the benefit of pupils in strictly public or common schools. Public-school funds can not be expended for the support of a strictly private school,—that is, a school from which children legally entitled to enjoy the benefits of the public-school fund may be excluded. But while the expenditure of public-school funds is confined to public schools, we are of the opinion that in the conduct of the public schools the proper authorities (such as the trustees of a school district) may, in their discretion, make any expenditure of the funds which is absolutely necessary for the proper maintenance of the school entrusted to their charge. They might properly expend a portion of the money in repairing or improving the school building, or in fitting it with proper appliances and conveniences. They might insure the school property against loss by fire, and pay the premium from the school fund. By a parity of reasoning we have no hesitation in holding that funds derived from local taxation within a school district may properly be expended by the trustees of the district in protecting or preserving the right of local taxation for educational purposes, by the employment of an attorney, or in other legitimate expenses necessary for presenting their rights in the adjudication of the case. This ruling disposes of the alleged breach of the bond in the payment of the attorney's fee and of traveling expenses of witnesses before the legislative committee. The trustees of Wesley Chapel school district contracted to pay the attorney's fees and the expenses of the witnesses. They had the right to make the contract if the expenditure was necessary, and, according to the evidence in the record, the trial judge was authorized to conclude that the expenditure was necessary.

4. Regardless of the authorization of the county board of education, and the settlement with the county school commissioner, the treasurer was authorized, upon the order of the trustees of the

school district, to pay the tuition of those children of school age residing in Wesley Chapel school district who attended the school in Paulding county. As provided in § 1537 of the Political Code, the trustees have the right to fix the tuition for non-resident pupils. The power of fixing the rate of tuition for pupils not residing in the district naturally implies the power of the trustees of the district in which the non-resident pupils reside to agree, upon their part, to pay this tuition; because each child of school age (with some exceptions) is equally entitled to receive the benefit of the common-school fund apportioned by the State. It would be mockery to hold that the law, while devolving upon trustees of the common schools the solemn and responsible duty of providing means for the education of children of school age within their district, denies them the power to perform this duty. It is within the power of trustees of any school district in this State to provide means by which all children of school age in every school district may receive the benefit of the school fund belonging to that district. And to that end the trustees may either contract with the trustees of an adjoining school district for the payment of the tuition of non-resident pupils to themselves, or may agree to pay to the trustees of an adjoining school district, whether in the same or in an adjoining county, the tuition of resident pupils when they determine that these pupils can more advantageously or conveniently attend the school of the adjoining district than the school of the district in which they reside.

5. The point is raised by the plaintiffs in error that upon the repeal of the local-tax law in Wesley Chapel school district, it was the duty of Matthews, as treasurer of the local board of trustees, to pay over any funds in his hands to his successor as treasurer of the local board of trustees, and not to the county school commissioner. We think this position is well taken; but it does not affect the decision of the case, for the suit in the present instance does not declare a breach of the bond, except in the three payments to which we have referred; and, consequently, any payment made by Matthews to the county commissioner in settlement of his accounts is not involved. The only questions raised are as to the validity of the payment of the attorney's fees, the expenses of the witnesses, and the payment of the tuition of pupils, entitled to the benefit of the school fund in Wesley Chapel district, to a school in an adjoining

county. The title to public-school money paid into the hands of trustees of a school district while local taxation for school purposes was in force is unaffected by the fact that the local-tax law was thereafter repealed or abolished by the provisions of § 1536 of the Political Code (1910). The repeal of the local tax in Wesley Chapel school district did not abolish the office of treasurer of the board of trustees of that school district; and, by his bond, Matthews was bound to pay over any funds in his hands to his successor in office; and if he paid anything to the county commissioner, the payment would seem to be unauthorized. Certainly, if any of the funds paid by him to the county commissioner had been raised by local taxation and paid by the taxpayers of Wesley Chapel school district, they should have been expended solely for the benefit of that school; but the present suit is not brought to recover any money paid out by Matthews as treasurer, other than the three items enumerated above. As to this, the payment in each instance was authorized by the local board of trustees, and, therefore, the principal sum of \$106.35, sued for, was properly accounted for, according to the terms of the bond, and, having been legally expended by him, could not be paid over to his successor.

6. The judgment of the court below, under our view of the law, was required by the evidence. The payment of each of the sums expended by the treasurer was authorized by the trustees of the school district, and, as the spending of the money was necessary in the proper administration and preservation of the school fund with which the trustees were charged, it is needless to determine how far the mere order of the majority of the board of trustees would have protected the treasurer in making the payments, if they had been less closely connected with the proper maintenance and improvement of the educational facilities of the school district.

Judgment affirmed. Pottle, J., not presiding.

INDEX.

ABANDONMENT. See *Criminal Law*.

ABATEMENT. See *Pleading; Judgment*.

ABSENCE. See *Continuance; Judge; Limitations*.

ACCEPTANCE. See *Sale*.

ACCESSORY. See *Criminal Law*.

ACCIDENT. See *Charge of Court; Master and Servant; Negligence*.

ACCORD AND SATISFACTION.

Demurrer sustained as to petition disclosing executed compromise of cause of action. *Taylor v. Knowles*, 588.

Partial; distinct demands arising under entire contract, settled without affecting the others. *National Duck Mills v. Catlin*, 240.

ACCOUNT—OPEN.

Defense; requisites of answer to suit on verified account. *Nix v. Bruton*, 278.

Defense to justice's court suit on verified account, too late, after judgment; dismissal of appeal, proper. *Draper v. Burr Mfg. Co.* 321.

Evidence as to genuineness of account received through mail, *Nat. Produce Co. v. Cairo Melon Growers Asso.* 338.

Interest; judgment for, from date when account became due, properly entered on verdict for principal "and interest." *Thomas v. Monticello Vehicle Co.* 280.

ACCUSATION. See *Criminal Law; Slander*.

ACTION. See *Amendment; Limitations; Parties; Pleading; Process*.

Agreement, not enlarge essentials of trover suit. *McCord v. Hill*, 254.

Ambiguous. See catchword "Construction," infra.

Arbitration, as condition precedent to, under contract. *Farmers Oil Co. v. Sou. Refining Co.* 415-16.

Cause of action. See *Amendment*.

Construction of, whether ex contractu or ex delicto; rule that construction favorable to jurisdiction should be adopted, in case of doubt. *Fine v. So. Express Co.* 161.

Conversion, action for. See *Trover*.

Deceit, action for, on account of representation to obtain credit for another, not maintainable, unless the representation was in writing and signed. *Smith v. Jewett*, 294.

Demand before suit, when unnecessary, in trover. *Hicks v. Moyer*, 488; *Citizens Bank v. Peeples*, 705. Demand as prerequisite to lien foreclosure; not dispensed with by defendant's testimony that if made, it would have been refused. *Hutson v. Sutton*, 844. See *Municipal Corporation; Telegraph Company*, catchword "Notice."

ACTION—*continued*.

Election between allegations of negligence, not required. *C. & W. C. Ry. Co. v. Anchors*, 329.

Heirs entitled to maintain, without administration, when. *Flint River R. Co. v. Maples*, 574.

Homicide of child, when mother may maintain action for; history of legislation; decisions discussed. *Fuller v. Inman*, 680.

Injuries to personalty, code provision as to suits for, not applied to trover. *Hicks v. Moyer*, 489.

Joinder. See catchword "Misjoinder," *infra*.

Minor, as party. See *Parties*.

Misjoinder of causes of action; none here. *McDonald v. Butler*, 845, 850. Question as to misjoinder, concluded by judgment on demurrer. *Murphey v. Creamer*, 593, 602.

Money had and received; amendment changing cause of action. *Groover v. Tattnell Supply Co.* 679.

Notice before suit. See *Municipal Corporation; Telegraph Company*.

Personal property, recovery of. See *Trover*.

Possessor of realty entitled to recover for damage to it, without showing other title. *Flint River R. Co. v. Maples*, 575.

Possessory warrant. See that title.

Quantum meruit, action on, for service rendered without contract. *Douglas v. Rogers*, 486.

Remedy for every right. *Moore v. Winder*, 386.

Removal of cause. See that title.

"Suit" defined; not applied to seizures or proceedings in rem. *Weston v. Beverly*, 261.

Use of another, action for. *Yatesville Bkg. Co. v. Fourth Nat. Bank*, 2; *Metropolitan L. Ins. Co. v. Morrow*, 433; *Dickson v. Matthews*, 542; *Musgrove v. Luther Pub. Co.* 650; *West v. Morris*, 652; *Bales v. First Nat. Bank*, 703. Such action raises no question of defendant's liability to usee named. *Yatesville Bkg. Co. v. Fourth Nat. Bank*, 2.

ACTS OF THE GENERAL ASSEMBLY. See *Code Sections; Constitutional Law; Statutes*.

ADMINISTRATOR.

Action by heirs, for damage to realty, where no administrator had been appointed. *Flint River R. Co. v. Maples*, 574.

Action, proper party plaintiff in, to recover on insurance policy issued in name of intestate, is administrator. *Queen Ins. Co. v. Peters*, 289, 293.

Administration, lack of, shown by witness testifying as to examination of records of ordinary's office. *Atkinson v. Hardaway*, 389. Testimony that there had been no administration, assumed to have been based on due examination of records, when not objected to at trial. *Flint River R. Co. v. Maples*, 574.

Bar of statute of limitations; exception as to unrepresented estates; appointment of temporary administrator, not such "representation" as to cause statute to begin running against estate. *Baumgartner v. McKinnon*, 219.

Contract in name of decedent, made after his death, effect of. *Queen Ins. Co. v. Peters*, 292.

ADMINISTRATOR—*continued*.

Intestacy presumed until proof of will. *Atkinson v. Hardaway*, 389.

Party, administrator necessary, when. *Queen Ins. Co. v. Peters*, 289, 293.

Presumption of intestacy. *Atkinson v. Hardaway*, 389.

"Representation," meaning of. See catchword "Bar," *supra*.

Returns prima facie evidence in favor of, after allowance; impeachable in any court having jurisdiction of parties and subject-matter. *Peavy v. Clemons*, 507. Consent decree here did not prevent this rule from applying. *Id.*

Temporary administrator, duties and powers of. *Baumgartner v. McKinnon*, 219. And see catchword "Bar," *supra*.

ADMISSION. See *Criminal Law; Evidence*.

ADVICE. See *Damages*.

AFFIDAVIT. See *Amendment; Illegality; Jury*.

AFFRAY. See *Criminal Law*.

AGENCY. See *Bank; Insurance; Liquor; Principal and Agent; Telegraph Company*.

AGRICULTURE. See *Fertilizer; Landlord and Tenant*, catchword "Crop."

AGREEMENT. See *Contract; Evidence*, catchword "Parol;" *Statute of Frauds*.

ALCOHOLIC LIQUOR. See *Liquor*.

ALIBI. See *Criminal Law*.

ALTERATION. See *Pleading*.

Burden of proof as to execution of note was on plaintiff, where alteration was pleaded under oath. *Wilson v. Barnard*, 99.

Copy admitted in evidence to show difference between original paper and paper as altered, when. *Id.*

Material alteration made by changing name of payee in note, without maker's knowledge. *Id.*

Plea of non est factum authorizes proof of material alteration. *Id.*

ALTERING MARK OF ANIMAL. See *Criminal Law*.

AMBIGUITY. See *Action; Charge of Court; Deed*.

AMENDMENT.

Accusation; objection as to time of amendment, too late. *Whipple v. State*, 214.

Action on contract, for price of goods sold and delivered, can not be changed to suit for money had and received. *Groover v. Tattnell Supply Co.* 679.

Affidavit for garnishment, when amendable. *Stovall v. Joiner*, 204.

Answer, amendment of, after time for answering has expired. *Wilson v. Barnard*, 98.

Cause of action not changed by, as to description, by changing number of building, when. *Heard v. Camp*, 167. Not changed by substituting another as plaintiff suing for use of original plaintiff. *Metropolitan L. Ins. Co. v. Morrow*, 433. Cause of action changed by. *Groover v. Tattnell Supply Co.* 679.

AMENDMENT—*continued.*

- Certiorari, pleadings not amendable on hearing of. *Higdon v. William-son*, 379.
- Clerical error, amendment correcting. *Heard v. Camp*, 168.
- Common-law liability declared on, action not convertible into suit on statutory liability. *Hartwell Ry. Co. v. Kidd*, 771.
- Continuance for surprise by. See catchword "Surprise," *infra*.
- Copy of note sued on, amended as to name of bank at which payable, and rate of interest. *Sartorius v. Paper Mills Co.* 522.
- Court not named in petition filed therein; omission cured by amendment, when. *Nance v. Patterson*, 843.
- Description, proper amendment of, as to street number of building. *Heard v. Camp*, 167.
- Doctrine of, liberal. *Stovall v. Joiner*, 205.
- Enough to amend by; answer here was not. *Moss v. Anderson*, 785.
- Error in allowing, not reached by assignment of error as to overruling demurrer. *Blocker v. Irvine*, 26.
- Error in ruling as to, rendered subsequent proceedings nugatory. *Heard v. Camp*, 168; *Groover v. Tattnell Supply Co.* 680.
- Exception to refusal to allow, can not properly be made in motion for new trial. *McFarland v. Lee*, 698.
- Garnishment proceedings, amendment of. *Stovall v. Joiner*, 204.
- Judgment imposing punishment, amendment of. *Clark v. Trippe*, 468.
- Jurisdiction shown by. *Stovall v. Joiner*, 205.
- Liberality of law of Georgia as to. *Id.*
- Motion for new trial, amendment to, not approved by trial judge, not considered. *Mack v. State*, 835.
- Number of house, correction of. *Heard v. Camp*, 167.
- Party; lack of guardian ad litem or prochein ami, when amendable, and cured by verdict. *Sams v. Covington Buggy Co.* 191.
- Party; substitution of another as plaintiff suing for use of original plaintiff. *Metropolitan L. Ins. Co. v. Morrow*, 433; *Dickson v. Matthews*, 542; *Musgrove v. Luther Pub. Co.* 650; *West v. Morris*, 651; *Bales v. Bank*, 703.
- Process, prayer for, when not amendable by substitution of different defendant. *White v. Brown*, 530.
- Sentence, amendment of, as to place of punishment. *Clark v. Trippe*, 468.
- Surprise by, when not ground for continuance. *Farmera Oil Co. v. Sou. Refining Co.* 415. Movant should show he is less prepared to go to trial. *Sartorius v. Paper Mills Co.* 522.
- Time; when no error in allowing amendment of answer, after expiration of time for filing answer. *Wilson v. Barnard*, 98.
- Verdict cured amendable defect. *Sams v. Covington Buggy Co.* 191.
- Verdict in criminal case, change of. *Register v. State*, 623.
- Waiver of objection to, by delay. *Whipple v. State*, 214.
- Use of another. See catchword "Party," *supra*.

AMOUNT. See *Damages*; *Verdict*.

ANIMAL. See *Criminal Law*; *Negligence*; *Railroad*; *Sale*, catchword "Horse;" *Trover*.

ANNUITY TABLE. See *Damages*.

ANSWER. See *Amendment*; *Pleading*.

APPEAL. See *Certiorari*; *Practice in Court of Appeals*.

Dismissal of defendant's appeal in justice's court, in absence of defense. *Draper v. Burr Mfg. Co.* 321.

Filing not entered on appeal papers, no ground to dismiss. *Veruki v. Savannah Electric Co.* 201.

Jurisdiction of justice's court lost by, and further proceedings in that court a nullity. *McDougald v. Chattanooga Medicine Co.* 653.

Mistake or omission of magistrate in sending up papers, not require dismissal, when. *Veruki v. Savannah Electric Co.* 204.

Partnership, requirement as to appeal and bond in case of. *Gray & Dudley Co. v. Cornelia Furniture Co.* 605.

APPLIANCES. See *Master and Servant*.

APPLICATION OF PAYMENT. See *Payment*.

ARBITRATION.

Agreement in contract of sale, as to arbitration of differences that might arise, not make arbitration a condition precedent to suit, without clear provision to that effect. *Farmers Oil Co. v. Sou. Refining Co.* 415-16.

ARCHITECT. See *Service*.

ARGUMENT.

Appearance, dress, tone of voice, and physical defects; improper argument as to. *Moore v. State*, 812.

Guilt, improper argument as to. *Id.* 805. Dissent, 815.

Illustration of manner in which wound might have been inflicted, counsel not allowed to make, with gun not introduced in evidence. *Carswell v. State*, 33.

Improper. "This notorious character, this notorious blind tiger," by prosecuting attorney, as to accused on trial for selling liquor, improper, when. *Harris v. State*, 70. Reading supposed newspaper item, as matter of illustration, not improper, when. *G. S. & F. Ry. Co. v. Ransom*, 558. Based on unwarranted inference from evidence; presumptively prejudicial; error in not declaring mistrial. *Knowles v. Dayries Rice Co.* 567. Stating prejudicial facts not appearing from evidence, and not fairly deducible from it, required new trial, where court refused to rebuke counsel and give proper instruction to jury. *Martin v. State*, 798. Improper to express opinion that the accused is guilty, or to argue that his failure to introduce testimony is attributable to conscious guilt. *Moore v. State*, 805. Dissent, 815. Omission to instruct jury to disregard improper argument, no ground for new trial, where judge reprimanded the speaker, and nothing further was requested by objecting counsel. *Harris v. State*, 70. Not met with proper objection or motion at trial, no ground for new trial. *Satterfield v. Ayers*, 742. Made before jury impaneled, no reason for setting aside verdict. *Martin v. State*, 799. Remedy for. *Moore v. State*, 805, 811-12.

ARGUMENT—*continued.*

Mistrial on account of. See catchword "Improper," *supra*.

Remedy, where jurors hear prejudicial statements in, before impaneled.
Martin v. State, 799.

ARMS. See *Criminal Law*.

ARREST. See *Criminal Law*.

ARSON. See *Criminal Law*.

ASSAULT. See *Criminal Law*.

ASSIGNMENT. See *Insurance; Landlord and Tenant; Parties; Payment*.

ASSIGNMENT OF ERROR. See *Certiorari; New Trial; Practice in Court of Appeals*.

ASSOCIATION. See *Corporation; Insurance*.

ATTACHMENT.

Deed not recorded, superior to subsequent attachment against the property conveyed. *Smith v. Worley*, 282. See *Balchin v. Jones*, 437.

Non-residence, as affecting statute of limitations. *Cooper v. Most Nursery Co.* 351. Non-residence not result from mere casual or temporary absence from State on business or pleasure; defendant's statement of intention, admissible in evidence. *Flemister Grocery Co. v. Wright Mercantile Co.* 702. And see *Damile*.

ATTESTATION. See *Deed; Mortgage*.

Witness need not be produced to prove execution of paper, where party who executed it testifies to its execution. *Christie v. Shingler*, 529.

ATTORNEY AT LAW. See *Argument*.

Authority of, where employed to collect claim for rent, not extend to making contract for landlord to pay for improvements. *McMichen v. Brown*, 506.

Continuance because of attorney's want of time for preparation. See *Continuance*.

Employment to make argument before legislative committee, power of school-district trustees as to. *Taylor v. Matthews*, 852.

Fees claimed in suit on insurance policy, whether damages or costs. *Queen Ins. Co. v. Peters*, 290, 291. Recovery not authorized by evidence. *Id.* 294. Issue whether there was a verbal contract entitling attorney to retain half of amount collected; verdict for client not set aside, on conflicting evidence. *Garland v. Rumble*, 347. Percentage of recovery, based on amount due at time of trial, not amount alleged to be due when suit filed. *Slack v. Elkins*, 571. Implied promise to pay reasonable fee to attorney examining title, on employment of agent in sale of land. *West v. Morris*, 651. Fee for opposing proposed legislation, when payable from school fund. *Taylor v. Matthews*, 852.

School-district trustees' power to employ. *Id.*

AUTOMOBILE. See *Negligence*.

AUTREFOIS ACQUIT. See *Criminal Law*.

BAD FAITH. See *Damages*; *Fraud*.

BAIL. See *Bond*; *Trover*.

BAILMENT. See *Trover*.

Involuntary bailee's duty as to disposition of deteriorating goods. *Salant v. Dannenberg Co.* 263.

Levying officer's deposit of property with third person for safe-keeping; invalid agreement as to disposition of property. *James v. Pepper*, 266.

BANK. See *Check*.

Agency of, for collection of check deposited; when revocable. *Cronheim v. Postal Tel. Co.* 716, 721.

Cashier's check, effect of. *Yatesville Bkg. Co. v. Fourth Nat. Bank*, 3.

Damages against national bank. See catchword "National," *infra*.

Deposit of check indorsed "for collection and credit for deposit" to account of payee, effect of, as to title. *Cronheim v. Postal Tel. Co.* 716, 721.

Depositor of check for collection, not awarded priority over general creditors of insolvent bank. *Id.* 716, 723.

Insolvent; priority in distribution of assets. *Id.*

National bank's officers are not authorized to prosecute for violation of criminal law of the State; bank not liable for wrongful prosecution. *Hansford v. Nat. Bank of Tifton*, 270; *Roberts v. Nat. Bank of Tifton*, 272. Powers of such banks; they can not ratify ultra vires acts of officers. *Id.*

BANKRUPTCY.

Corporation, action by trustee of, against organizers. See *Corporation*, catchword "Organizers."

Discharge must be pleaded and proved, if relied upon in suit in State court. *McDougald v. Chattanooga Medicine Co.* 653.

Discharge while trover pending, no defense to the action. *Birmingham Fertilizer Co. v. Cox*, 699.

Judicial cognizance of proceedings in, not taken by State court. *McDougald v. Chattanooga Medicine Co.* 653.

Lien of purchase-money mortgage, not divested by trustee's sale, without previous order (passed on due notice) that the sale should divest liens. *Horkan v. Eason*, 236.

Sale in, when subject to mortgage. *Id.*

Trover, discharge no defense to. *Birmingham Fertilizer Co. v. Cox*, 699.

Trustee, title and authority of. *Rosenheim Shoe Co. v. Horne*, 584.

BAR. See *Limitation*; *Pleading*.

BATTERY. See *Criminal Law*.

BEER. See *Liquor*.

BENEFIT SOCIETY. See *Insurance*.

BIGAMY. See *Criminal Law*.

BILL OF LADING. See *Railroad*.

BILL OF SALE. See *Deed*.

BILLS AND NOTES. See *Check*; *Promissory Note*.

BIRDS. See *Criminal Law*, catchwords "Game law."

BONA FIDE PURCHASER. See *Husband and Wife; Promissory Note.*

BOND. See *Certiorari; Principal and Surety.*

Bail-trover; amount of defendant's recovery, where plaintiff is nonsuited; defendant not owner of the property holds the money for those entitled to it. *Kaufman v. S. A. L. Ry.* 248.

Claim; recital that obligor claims property, not evidence that a claim has been interposed; it shows only his intention to interpose. *McFarland v. Lee*, 698. Claim not interposed, bond a mere voluntary obligation. *Id.*

Damage from breach of forthcoming bond. See catchword "Forthcoming," *infra*.

Estoppel of obligor securing advantage by, to attack as invalid. *Alexander v. Morris*, 497.

Forfeiture followed by appearance of principal at sheriff's office in vacation, payment of costs, and execution of new bond, before return term of scire facias; surety on first bond discharged. *Fleming v. Smith*, 701.

Forthcoming, not good as statutory bond, good as common-law bond. *Alexander v. Morris*, 497. Damage, as well as breach, must be shown, to authorize recovery on forthcoming bond. *Grace v. Finleyson*, 480. No damage from breach, where property damaged in obligor's possession was worth more than amount due on *fi. fa.* *Id.* Forthcoming bond for heavy articles not moved from place of levy, and advertised as at that place; liability of obligor. *Id.* Tender of property by obligor, when not required. *Id.* Title of property, not involved in suit on forthcoming bond; sole issue is as to breach. *McFarland v. Lee*, 698.

Jurisdiction not waived by giving forthcoming bond. *Hall v. Roebr*, 380.

Replevy by plaintiff in bail-trover; amount of defendant's recovery, where plaintiff is nonsuited. *Kaufman v. S. A. L. Ry.* 248.

Waiver of jurisdiction not result from giving forthcoming bond. *Hall v. Roebr*, 380.

BOND FOR TITLE. See *Title.*

BOUNDARY. See *Counties.*

River; change of course, as affecting boundary. *James v. State*, 15.

State line in Savannah river, the current or main thread of channel, as fixed in 1787; not altered by subsequent change of current or channel by work of U. S. government to improve navigation. *Id.*

BRAND. See *Fertilizer.*

BRANDING ANIMAL. See *Criminal Law.*

BREACH OF CONTRACT. See *Contract.*

BRIDGE. See *Counties.*

BRIEF. See *New Trial; Practice in Court of Appeals.*

BROKER. See *Principal and Agent.*

BUILDER. See *Contract; Lien.*

BURDEN OF PROOF. See *Charge of Court; Evidence.*

BURGLARY. See *Criminal Law*.

BURIAL. See *Cemetery*.

CAPITAL STOCK. See *Corporation*.

CARE. See *Negligence*.

CARRIER. See *Express Company*; *Railroad*.

CASH SALE. See *Sale*.

CATTLE. See *Criminal Law*; *Negligence*, catchword "Animal;" *Railroad*, catchword "Stock."

CAUSE OF ACTION. See *Action*; *Amendment*.

CAUSE PROXIMATE. See *Negligence*.

CEMETERY.

City not liable for wrongful disinterment by officer in its cemetery, when. *McDonald v. Butler*, 845.

Disinterment wrongful, what recoverable. *Id.*

Owner of easement in burial lot, rights of. *Id.*

CERTAINTY. See *Contract*; *Pleading*; *Verdict*.

CERTIORARI.

Aliunde matters, not to be considered on hearing. *Higdon v. William-son*, 379.

Amendment to pleading, or addition to proof, not allowable on hearing. *Id.*

Assignment of error, sufficient, as against motion to dismiss. *Langley Mfg. Co. v. Frey*, 753.

Available when. See catchword "Remedy," *infra*.

Bond; approval alleged, and not contradicted; error in dismissing certiorari for lack of approved bond. *Rice v. Moultrie*, 454.

Bond in case from municipal court, to appear and abide judgment of superior court, as well as of municipal court, required. *Moon v. Jefferson*, 572. Approval by clerk of municipality, necessary; approval by mayor not sufficient. *Id.* Dismissal for lack of necessary bond or pauper affidavit. *Dixon v. Waycross*, 801.

Cases for which certiorari is not expressly provided by statute, constitution provides for. *Moore v. Winder*, 385-6.

Constitutional right to, discussed. *Id.*

Delay, bringing up case for; damages awarded by Court of Appeals, where no question of law was raised, and evidence was in conflict. *Barwick v. Slaughter*, 544.

Evidence conflicting, judgment not disturbed. *Central Ry. Co. v. Marshall*, 351.

First grant of new trial on, when not interfered with. *Freeman v. Maxwell Furniture Co.* 316; *Cochran v. Minter*, 337.

Judgment final, error in rendering, instead of ordering new trial; affirmation, with direction as to new trial. *Hazzard v. Mayor*, 191. When not to be entered on. *Langley Mfg. Co. v. Frey*, 753.

Jurisdiction; legal existence of court can not be questioned by certiorari directed to it. *Morton v. Rome*, 604.

CERTIORARI—*continued*.

Municipal corporation with territory in different counties; certiorari in superior court of either, to review judgment of municipal court. *Moore v. Winder*, 384.

Question not raised in trial court, not considered by reviewing court. *Fine v. So. Express Co.* 165; *Duren v. Layton*, 394.

Remedy by, in cases not expressly provided for. *Moore v. Winder*, 285-6. Available where no issue of fact. *Langley Mfg. Co. v. Frey*, 753.

CHARACTER. See *Charge of Court*; *Evidence*; *Slander*.

CHARGE OF COURT TO JURY.

Accident, instruction on theory of, proper here. *Holliday v. Athens*, 710, 713. Evidence requiring charge on theory of, on trial for assault. *Conoly v. State*, 822.

Alibi, instructions as to. See *Criminal Law*.

Allegations of petition, no error in stating. *Seaboard Ry. v. Hunt*, 273.

Ambiguous, as to whether judge was intimating opinion as to what was proved. *Morse v. State*, 61.

Assignment of error as to. See catchword "Exception," *infra*.

Burden of proof; no error against defendant in instruction to find for him if plaintiff had not carried the burden, or if defendant, by preponderance of testimony, or by sufficient proof to satisfy jury, had proved he was not liable. *G. & F. Ry. v. Johnson*, 101. Error in charging that on proof of certain acts deemed presumptive evidence of criminal intent, the burden of proving innocence would be shifted to defendant. *Fuller v. State*, 117. Omission to charge as to, without request, not error, in civil case. *Hickman v. Bell*, 320; *Brooks v. Griffin*, 498. Burden on plaintiff to prove every material allegation, etc.; error in so charging in claim case, as to plaintiff in mortgage *fi. fa.*, when. *First Nat. Bank v. Spicer*, 505. Burden in suit against railroad company for injury to employee, proper charge as to. *Central Ry. Co. v. McGuire*, 484. See catchwords "Preponderance of evidence," *infra*.

Care by injured person. See catchword "Negligence," *infra*.

Character of accused; no error in charge as to effect of evidence of good character. *Grusin v. State*, 153.

Circumstantial evidence, charge as to, not required, in absence of request, where there was direct, as well as circumstantial evidence. *Fuller v. State*, 35. No charge required on, when all the testimony is direct. *Wilson v. State*, 67. Facts requiring charge on. *Hays v. State*, 823. Law of, should be charged, without request, where exclusively relied on for conviction. *Bailey v. State*, 829.

Code section partly inapplicable, read in full, not cause reversal; but better to read applicable part only, or, if all is read, to make proper explanation. *Hays v. State*, 825-6.

Conflict of testimony, and inability to reconcile it; proper charge as to. *Gurley v. State*, 842-3.

CHARGE OF COURT TO JURY—*continued.*

- Contentions of plaintiff, no error in stating. *Seaboard Ry. v. Hunt*, 273.
Contentions stated in accordance with parol agreement or admission of counsel, not in accordance with pleading; no error. *Martin v. Dunbar*, 287.
- Correction requested by counsel, made by withdrawing part of; no error. *So. Ry. Co. v. Parham*, 532.
- Correctness presumed, as to charge not sent up, when. *Hartfelder v. Clark*, 422.
- Credibility of witnesses, proper instructions as to. *Central Ry. Co. v. McGuire*, 484. Charge that witness with best means of knowing the facts and least inducement to swear falsely may be believed, error, without qualification that the witnesses be of equal credibility. *Lawrence v. State*, 787.
- Criminal cases, instructions in, as to particular crimes. See *Criminal Law*.
- Damages for pain and suffering; no error in charge as to. *Central Ry. Co. v. McGuire*, 484 (6). Consideration of worldly circumstances of parties in estimating damages, error in charging as to. *So. Ry. Co. v. Cariledege*, 523.
- Defense excluded by, where not sustained by evidence; no error. *Hickman v. Bell*, 319.
- Definition, language requiring, sufficiently explained. *Morse v. State*, 61.
Definition not required, where not requested, of "unlawful arrest." *Renfroe v. State*, 38. Of "ordinary care." *W. U. Tel. Co. v. Ford*, 606. See catchwords "Reasonable doubt," *infra*.
- Definition of the word "charge." *Walker v. State*, 86. Directions not within this definition. *Id.* 86. -
- Dying declarations, instructions as to. See *Criminal Law*.
- Errors harmless in. *Atkinson v. Fountain*, 307. Harmless charge on manslaughter. *Kidd v. State*, 149. Inapplicable instructions, harmless here. *C. & W. C. Ry. Co. v. Finley*, 334. Mere verbal inaccuracies not misleading here. *L. & N. R. Co. v. Andrews*, 349. Charge not authorized by pleadings, harmless here. *So. Ry. Co. v. Parham*, 531. Harmless, where evidence demanded the verdict rendered. *Calhoun v. Central Ry. Co.* 656.
- Evidence; charge that a certain point should be determined "from the testimony of witnesses on the stand," error, where depositions had been introduced; but harmless, in view of subsequent instruction. *Martin v. Dunbar*, 287.
- Evidence demanding verdict relieved from need of instructions here. *W. U. Tel. Co. v. Ford*, 606.
- "Evidence may be autoptic preference;" no error in so charging. *Morse v. State*, 61.
- Evidence; intimation of opinion as to what proved. See catchword "Opinion," *infra*.
- Exception to extract from, should point out error. *Robinson v. Rothchilds*, 237. Exception to charge as a whole raises no question for decision. *Central Ry. Co. v. McGuire*, 484. Exception that certain instructions were not authorized, and were "otherwise illegal," too general. *Malloch v. Kicklighter*, 605.

CHARGE OF COURT TO JURY—*continued.*

Homicide, instructions as to. See *Criminal Law*.

Impeachment, omission to charge as to, no error, in absence of request. *Central Ry. Co. v. McGuire*, 484.

Inapplicable in parts, but not prejudicial. *C. & W. C. Ry. Co. v. Finley*, 334. See catchwords "Code section," *supra*.

Interest, as part of damages for killing stock by railroad train, charge as to, considered. *M., D. & S. R. Co. v. Hasty*, 103, 104.

Issue not made by pleadings; harmless error in charging on. *So. Ry. Co. v. Parham*, 531.

Manslaughter, instructions as to. See *Criminal Law*.

Moral and reasonable certainty is all that can be expected in legal investigations; when no error in so charging in civil case. *Central Ry. Co. v. McGuire*, 483.

Negligence of one using dangerous way when safe way is open to him, charge as to, considered. *Holliday v. Athens*, 711. Charge that plaintiff could not recover if, "by taking proper precautions," he could have avoided the consequences of defendant's alleged negligence; inaccurate, but not harmful here. *Id.*

Opinion as to what proved. Ambiguous, as to whether opinion was intimated. *Morse v. State*, 61. Language considered in connection with context, not objectionable. *Id.* When not intimated by the words, "That makes the crime complete," etc. *Grusin v. State*, 153. Use of word "purchaser," where sale was denied, not require reversal, here. *George v. State*, 209. Not intimated by this language: "the evidence of Mr. Killebrew as to certain statements made to him by James Brown." *Brown v. State*, 216. Not intimated by stating allegations of petition and contentions of counsel. *Seaboard Ry. v. Hunt*, 273. Language assuming fact in issue, evidently lapsus linguæ, cured by additional instruction. *Flint River R. Co. v. Maples*, 579. Intimation by refusing to receive verdict for lower grade of crime than charged. *Register v. State*, 632, 635. Opinion not intimated. *Slade v. State*, 802. See *Trial*, catchwords "Remark of judge."

"Ordinary care;" definition not required, when not requested. *W. U. Tel. Co. v. Ford*, 606.

Preponderance of evidence, burden on plaintiff to make out case by; error in so charging, where prima facie case was admitted, and defendant assumed burden of establishing an affirmative defense. *Cox v. McKinley*, 492; *Brooks v. Griffin*, 498. Charge on preponderance of evidence, not required, when not requested. *Id.* 498.

Presumption against defendant, not applicable to both of joint defendants; omission to negative presumption as to one, not require new trial, when. *So. Ry. Co. v. Parham*, 531.

Presumption of correctness, as to charge not sent up. *Hartfelder v. Clark*, 422.

Presumptive evidence of criminal intent, error in charge as to effect of, in requiring defendant to prove innocence. *Fuller v. State*, 117.

CHARGE OF COURT TO JURY—*continued*.

Reasonable doubt of guilt, failure to charge expressly as to, required new trial. *Norman v. State*, 802. "Reasonable and moral certainty," and "to the exclusion of a reasonable hypothesis," not so easily understood by juries as "beyond a reasonable doubt." *Id.* Proper charge on. *Smith v. State*, 840.

Request necessary, to require more detailed instructions than given. *Collins v. State*, 34. See catchwords, "Burden," "Circumstantial evidence," "Definition," *supra*.

Request that judge write charge. See catchword "Written," *infra*.

Technical words, use of, in charge, discussed. *Morse v. State*, 61, 62.. See *Norman v. State*, 802.

Witness; charge that a party is bound by testimony of a witness introduced by him, unless entrapped, inaccurate, but harmless here. *Holliday v. Athens*, 711, 715.

Written charge, when required. *Walker v. State*, 85. Directions not within definition of "charge." *Id.* 87. Notation as to code section, insufficient, where followed by the words: "read if statement made by defendant; erase if none." *Hays v. State*, 823..

CHARITY. See *Words and Phrases*.

CHEATING. See *Criminal Law*; *Fraud*.

CHECK. See *Criminal Law*.

Cashier's check, effect of. *Yatesville Bkg. Co. v. Fourth Nat. Bank*, 3.

Direction to stop payment, drawer's duty as to, on request of payee.. *Cronheim v. Postal Tel. Co.* 728.

Forged indorsement, remedies of drawee paying money on. *Yatesville Bkg. Co. v. Fourth Nat. Bank*, 1. Defenses by party receiving payment; subsequent delay in notifying him of the forgery, etc. *Id.* Return of instrument, not prerequisite to suit on indorser's warranty of genuineness. *Id.*

Indorsement; warranty of genuineness of indorsement, by subsequent indorsement; action on warranty. *Id.* Effect of indorsement to bank, "for collection and deposit" to account of payee, was to make bank the payee's agent to collect; title remained in him; agency revocable before collection. *Cronheim v. Postal Tel. Co.* 716.

Warranty of genuineness of prior indorsement. *Yatesville Bkg. Co. v. Fourth Nat. Bank*, 1.

CHILD. See *Criminal Law*; *Parent and Child*.

CITIES. See *Municipal Corporation*.

CITY COURT.

Atlanta, opening default in. *Tenn. Oil Co. v. American Art Works*, 45.. Default, when not opened in city court of Atlanta. *Id.*

Fitzgerald; act construed as to terms for trial of criminal cases. *Haygood v. State*, 394.

Newton; act abolishing, unconstitutional. *Cook v. State*, 580.

Terms for trial of criminal cases; statute construed as to. *Haygood v. State*, 394.

Transfer of indictment to, deprived superior court of further jurisdiction. *Cook v. State*, 580.

Trust estate, jurisdiction of suit to subject. *Maxwell v. Rice*, 643.

CLAIM. See *Bond*.

Burden of proof cast on claimant by entry of levy, reciting possession by defendant. *Bank of Southwestern Georgia v. Empire Ins. Co.* 320. Burden on plaintiff to prove every material allegation, etc.; error in so charging jury in claim case, as to plaintiff in mortgage *fi. fa.* *First Nat. Bank. v. Spicer*, 505.

Dismissal when claimant failed to appear, proper; or plaintiff could make out case and take verdict finding the property subject. *Bank of Southwestern Georgia v. Empire Ins. Co.* 320.

Possession by defendant in *fi. fa.*, recital of, in entry of levy, made *prima facie* case in behalf of plaintiff in *fi. fa.* *Id.*

Presumption of ownership from possession by defendant at time of levy, rebutted; verdict finding the property subject to plaintiff's *fi. fa.*, set aside. *Moore v. Kendall*, 375.

Wife's, to property levied on as husband's; sufficiency of evidence as to bona fides of transaction between them, a jury question. *Brooks v. Griffin*, 497.

CLASS LEGISLATION. See *Constitutional Law*.

CLERK OF SUPERIOR COURT.

Employee of, may record claim of lien. *Calhoun Brick Co. v. Pattillo Lumber Co.* 181.

CLUB. See *Liquor*.CODE. See *Charge of Court*; *Code Sections*.

Omitted part of statute, still of force: section 2 of limitation act of March 6, 1856. *Hicks v. Moyer*, 488.

CODE SECTIONS—CIVIL CODE OF 1910.

4, par. 4. Rule as to when singular and plural shall each include the other; applied to the word "defendant," in verdict. *Monk-Sloan Co. v. Quitman Oil Co.* 392.

264. Officer's removal from county, to be judicially ascertained before office is vacated thereby. *Bush v. State*, 545. Proper mode of raising question as to qualification of prosecuting officer; not plea in abatement. *Id.*

322, par. 7. Contract of sale, not within statute of frauds, after acceptance and long use of article sold. *Patrick v. Shields*, 506.

387. Charge of court giving this section in full, though partly inapplicable, not cause reversal; but better to read applicable part only, or, if all is read, to make proper explanation. *Hays*, 825-6.

473-5. Determination of boundary line between counties where disputed, statute as to, not unconstitutional, as being an attempt to confer judicial power on Secretary of State. *Early County v. Baker County*, 305.

893, 897. City not liable for officer's wrongful disinterment of dead body, when. *McDonald v. Butler*, 847.

898. Notice of defect in street need not be alleged in suit against city for injury therefrom. *Whidden v. Thomasville*, 194.

910. Notice before suit against city, for damages; this section substantially complied with. *City of Sandersville v. Stanley*, 360.

CODE SECTIONS—CIVIL—continued.

1154. See 5265, *infra*.
- 1531 et seq. Powers of trustees of school districts, as to contracts and expenditures. *Taylor v. Matthews*, 852. Power to pay expense of resisting proposed legislation affecting school district. *Id.* Power to contract for tuition of children of one district attending school in adjoining district. *Id.*
1536. See 1531, *supra*. Repeal of local-tax law, not affect title to funds paid to trustees of school district while the law was in force. *Id.*
- 1763-5. License to "near beer" dealer, not authorize keeping on hand intoxicating liquor. *Cassidy v. State*, 123.
1882. Weights and measures; non-compliance with law as to, as defense to foreclosure of mortgage to secure debt for supplies. *Kight v. Robinson*, 549.
2181. See 264. Domicile not changed without intent to change. *Bush v. State*, 546.
2220. Organizers of corporation, beginning business before minimum capital stock subscribed for; liability of. *Rosenheim Shoe Co. v. Horne*, 582. Liability in favor of creditors, not in favor of the corporation, and not enforceable by trustee in bankruptcy of the corporation. *Id.* Meaning of "minimum capital stock." *Id.*
2549. Attorney's fees claimed, whether damages or costs, in suit against insurance company. *Queen Ins. Co. v. Peters*, 290, 291. Evidence not authorizing recovery of. *Id.* 294.
2727. Rule as to time of opening and closing waiting-rooms at stations, reasonable; intending passenger (woman) excluded at night and made ill by exposure, not entitled to recover. *Smith v. S. A. L. Ry.* 230. Dissent, 235.
2729. Carrier's power to adopt rules as to stopping places for passenger-trains. *So. Ry. Co. v. Flanigan*, 747.
2730. Delivery to carrier by loading goods on car left at warehouse. *Central Ry. Co. v. Bird*, 425.
2751. Action against connecting carrier, without allegation as to receipt of goods in good order, held based, not on statute, but on common-law liability; not convertible into suit on statutory liability. *Hartwell Ry. Co. v. Kidd*, 771. Presumption as to receipt of goods in good order. *Id.*
2780. Liability of railroad company for tort of employee. *L. & N. R. Co. v. Hudson*, 171. Burden of proof in suit against railroad company for injury to employee; proper charge to jury. *Central Ry. Co. v. McGuire*, 484. Error in charging jury as to presumption against railroad company, in suit for admitted negligence in putting passenger off train at wrong place. *So. Ry. Co. v. Cartledge*, 523, 526. Charge of court not negating presumption, as to individual codefendant, after charging as to presumption against company, not error, in absence of request. *So. Ry. Co. v. Parham*, 539. Presumption not rebutted. *G. S. & F. Ry. Co. v. Kell*, 675; *M., D. & S. R. Co. v. Smith*, 706.

CODE SECTIONS—CIVIL—*continued.*

- 2782 et seq. Presumption created by act of 1909, in case of injury to railroad employee in service, not applicable to cause of action antedating the statute. *Wallace v. So. Ry. Co.* 90, 94. Recovery by railroad employee injured by negligence of fellow servant, not barred by contributory negligence not amounting to lack of ordinary care. *S. A. L. Ry. v. Hunt*, 273. Prima facie case against railroad company, sued for homicide of employee, made by proof that it occurred while he was discharging duties of his employment. *Atkinson v. Hardaway*, 389. Damages for homicide, under this statute; full value of decedent's life, without deduction for expenses. *Id.* 390. Question as to constitutionality of act of 1909, not properly made. *Id.* 389.
- 2823, par. 3. See 2220, *supra*.
- 2866 et seq. See *Insurance*, catchword "Fraternal."
- 2988, 2990. See 3021, *infra*.
3021. Support of children, father not relieved of, by contract of separation and provisions as to custody, here; liable to mother for amount paid by her for medicine, etc., for them. *McCarter v. McCarter*, 754.
- 3130-1. Employee's knowledge of defects of machinery, as bar to recovery for injury. *Butler v. Atlanta Buggy Co.* 179.
3220. Creditor with lien on two funds compelled to pursue the one not available to another lienholder. *Moore v. Cofield*, 198.
- 3222-3. See *Statute of Frauds*.
- 3226 et seq. Sale of stock of goods in bulk; constitutionality of act of 1903; act construed strictly; not applied to settlement with all creditors, whereby the stock was turned over to a third person for sale, and the proceeds paid to the creditors. *Stovall Co. v. Shepherd Co.* 498.
3257. Description of property in bill of sale, sufficiency of. *Balchin v. Jones*, 436.
3306. Trover by one to whom defendant had transferred title of animal as security for debt; death of animal, as defense. *McCord v. Hill*, 254.
- 3318-19. Unrecorded sale of personalty with title reserved, held absolute as to creditors of donee of purchaser, when. *Reisman v. Wester*, 96.
3320. Recording not necessary to give priority to deed of bargain and sale over subsequent judgment or attachment. *Smith v. Worley*, 282.
3334. "Laborer;" when not applied to one employed as manager of store, who "did all the work" of the store, swept it, and loaded goods on drays. *Pruitt v. Pace*, 201.
- 3353, par. 2. See *Lien*, catchword "Record."
3366. Foreclosure of laborer's lien, not a suit until counter-affidavit made; and no basis for garnishment. *Weston v. Beverly*, 262. Demand as prerequisite to foreclosure, not dispensed with by defendant's testimony that if made, it would have been refused. *Hutson v. Sutton*, 844.

CODE SECTIONS—CIVIL—continued.

- 3414, 3416. Both exemptions not allowed. *McFarlin v. Reeves*, 581.
3495. Involuntary bailee's duty as to disposition of deteriorating goods. *Salant v. Dannenberg Co.* 265.
3542. Surety not released by agreement without consideration. *Williams-Thompson Co. v. Williams*, 253.
3544. Discharge of surety, not result from payee's failure to sue maker of note. *Baumgartner v. McKinnon*, 226.
3558. See 5971, *infra*.
3587. Commission on sale of land, when not recoverable from owner selling in period during which, under contract, the agency was to be "irrevocable." *Moore v. May*, 199.
3608. Money paid by mistake to agent, when recoverable from him, and when not. *Rogers v. Durrence*, 659.
3657. Administrator, proper personal representative to sue on insurance policy issued in name of intestate. *Queen Ins. Co. v. Peters*, 293.
- 3705-7. Crops growing and immature are not personal property, and are not recoverable by possessory warrant. *Gainous v. Martin*, 210. Cropper's interest in growing crop, mortgageable, but not subject to levy before settlement with landlord. *Fountain v. Fountain*, 759.
- 3712-15. Action against third person for renting to tenant or disturbing relation with landlord; what plaintiff must show. *Rawlings v. Sheppard*, 350.
- 3929, 3933. See 3657, *supra*.
- 3935-7. See 4376, *infra*. Duties and powers of temporary administrator. *Baumgartner v. McKinnon*, 222.
3972. See 3935, *supra*.
3994. Administrator's returns, prima facie evidence in his favor, after allowance; impeachable in any court having jurisdiction of parties and subject-matter. *Peary v. Clemons*, 507.
4126. "Cash sale," meaning of; applied where purchaser was allowed a short time to get cash, after delivery. *A. C. L. R. Co. v. Gordon*, 311.
4131. Damages for buyer's failure to take goods ordered, suit for deficiency on resale; necessary allegations as to notice, etc. *Sims-McKenzie Co. v. Patterson*, 744.
4134. Delivery to carrier, not pass title from seller sending draft for price, with attached bill of lading to his own order. *So. Ry. Co. v. Strozier*, 159.
4172. Not limitation of trover. Trover barred after four years by law omitted from code, but still of force. *Hicks v. Moyer*, 488.
4179. Parol proof as to consideration of note and deed. *Wood v. Jones*, 737.
4186. See 3257, *supra*.
4208. Recording not necessary to give priority to bill of sale over subsequent judgment or attachment. *Balchin v. Jones*, 437.
4222. Dead man named as insured, in fire-insurance policy; contract valid, when. *Queen Ins. Co. v. Peters*, 292.

CODE SECTIONS—CIVIL—*continued*.

4286. Notice to purchaser of note, as to defense; sufficiency of circumstances, question for jury, not court. *Park v. Buxton*, 356. Non-payment of interest when due may be such a circumstance, where apparent from note or known to purchaser buying note before maturity of principal. *Id.*
4291. See 4286, *supra*.
4295. Alteration of note, if material, may be proved under plea of non est factum. *Wilson v. Barnard*, 98.
4305. Offer to rescind, on discovery of fraud; prerequisite of recovery in trover against one obtaining property under contract induced by fraud. *Story v. Williams*, 392.
4316. Application of payment, where not directed by debtor; surety not released by creditor's applying it to younger debt, when. *Baumgartner v. McKinnon*, 219.
4336. Conclusiveness of judgment, as to question that might have been made. *Puffer Mfg. Co. v. Rivers*, 155-6. Judgment on one note of series, how far conclusive as to matters pleaded in suit on other notes of the series. *Id.*
4340. Recoupment of damages on account of sale of defendant's cotton by plaintiff as factor, in violation of instruction; allowed in suit on note for advances. *Wood v. Jones*, 735.
4343. Set off against beneficiary allowed, where plaintiff sues for benefit of another. *Metropolitan Ins. Co. v. Morrow*, 441.
- 4350-3. See 4340, *supra*.
4359. Sealed instrument; note not rendered such by scroll with L. S. after signature, though attesting clause recite it was sealed. *Waterman v. Barclay*, 108.
- 4376-7. Statute of limitations; appointment of temporary administrator is not such "representation" as to cause statute to begin running against estate. *Baumgartner v. McKinnon*, 219.
4413. "Person," in this section, includes corporation. *L. & N. R. Co. v. Hudson*, 171. Liability of railroad company for tort of employee. *Id.*
4424. Mother's suit for homicide of child six years of age, maintainable, though father was contributing to support of family; allegations sufficient as to dependency, child's earning capacity, etc. *Fuller v. Inman*, 680.
4425. See 2782, *supra*.
4441. Action for deceit, in representation to obtain credit for another, not maintainable, unless the representation was in writing and signed. *Smith v. Jewett*, 294.
4457. Nuisance; sufficient indictment for. *Central Georgia Power Co. v. State*, 449.
4472. Possessor of land may recover for injury to it, without showing further title. *Flint River R. Co. v. Maples*, 575.
4483. Death of animal, as defense to trover suit. *McCord v. Hill*, 254. Essentials of trover suit, not enlarged by agreement. *Id.*
4496. See 4172, *supra*.
4503. Damages punitive, when allowed for wrongful disinterment of dead body. *McDonald v. Butler*, 848.

CODE SECTIONS—CIVIL—*continued.*

4504. Damages; error in giving this section in charge to jury, where the evidence showed negligent omission of duty, without aggravating circumstances. *So. Ry. Co. v. Carledge*, 523.
- 4509-10. Proximate cause of loss of eye, whether delay in delivering telegram to physician. *W. U. Tel. Co. v. Ford*, 618. Damages too remote, where passenger put off train at wrong place was made ill by rain beginning later. *So. Ry. Co. v. Carledge*, 525.
4626. Fraud in non-disclosure of contents of package by shipper, not shown by evidence here. *Fine v. So. Express Co.* 167.
- 4644, par. 5. Oath on trial before municipal body, as basis of prosecution for perjury. *Broadwater v. State*, 458.
4728. Answer to suit on verified account; requisites of. *Nix v. Bruton*, 278.
4730. Affidavit to account in justice's court, not properly admitted in evidence on trial; error harmless, in view of other evidence. *Lackey v. Old Kentucky Mfg. Co.* 382. Counter-affidavit too late, after judgment; defendant's appeal dismissed. *Draper v. Burr Mfg. Co.* 321.
4863. See *Charge of Court*, catchwords "Opinion as to what proved;" *Trial*, catchwords "Remark of judge."
4957. Argument improper; remedy for. *Moore v. State*, 805. Improper to express opinion that accused is guilty, or to argue that his failure to introduce testimony is attributable to conscious guilt. *Id.* 805. Dissent, 815.
4998. Filing not entered on appeal papers, no ground to dismiss. *Veruki v. Savannah Electric Co.* 202.
5013. See 4998, *supra*.
5094. See 5265, *infra*.
5152. Bail-trover; amount of defendant's recovery, where plaintiff is nonsuited; defendant not owner of the property holds the money for those entitled to it. *Kaufman v. S. A. L. Ry.* 250.
5157. Inference of negligence, in case of explosion of bottle containing carbonated beverage; doctrine of maxim *res ipsa loquitur* discussed. *Payne v. Rome Coca-Cola Co.* 764.
5170. Claim; proper practice where claimant fails to appear. *Bank of Southwestern Georgia v. Empire Ins. Co.* 320. Burden on plaintiff, as to property in claimant's possession when levy made. *First Nat. Bank v. Spicer*, 505. Error in charging jury that burden was on plaintiff to prove every material allegation, etc. *Id.*
- 5180 et seq. Certiorari, constitutional right to, in cases not expressly provided for by statute. *Moore v. Winder*, 385. Where municipal corporation has territory in different counties, certiorari may be obtained from superior court of either, to review judgment of municipal court. *Id.*
- 5192-4. Bond on certiorari in case from municipal court, to appear and abide judgment of superior court, as well as of municipal court, necessary. *Moon v. Jefferson*, 573. Approval by clerk of municipality, necessary; approval by mayor not sufficient. *Id.*

CODE SECTIONS—CIVIL—*continued*.

5199. Question not raised in justice's court could not be raised in reviewing court. *Fine v. So. Express Co.* 165.
5265. Garnishment; remedy not extended to cases not provided for by statute. *Weston v. Beverly*, 262. "Suit" defined; not applied to proceeding in rem. Foreclosure of laborer's lien, no basis for garnishment, when. *Id.*
5304. See 5706, *infra*.
5334. Affidavit of illegality, not avail as means of attacking judgment, by setting up suretyship of defendant duly served, who had day in court. *Cunnard v. Childs*, 175.
5371. Possessory warrant not remedy, where defendant's possession was not acquired in mode specified in this section. *Henderson v. De Medicis*, 190.
- 5395 et seq. Forcible entry and forcible detainer must both be proved, to authorize general verdict on charge of both. *Cate v. Knight*, 664.
5506. See 5180, *supra*.
5516. No privity of contract between A., who furnished material, and C., who had employed B. to do work and had agreed with B. to pay for material to be used in it, B. buying the material, and, without authority, having it charged by A. to C. *Dickson v. Matthews*, 542.
5524. Lack of guardian ad litem or next friend, amendable defect, cured by verdict. *Sams v. Covington Buggy Co.* 191.
5551. Waiver of mistake in date of process, by appearance and pleading. *Sartorius v. Paper Mills Co.* 522.
5565. Service on minor; law as to, not strictly apply in case of minor filing counter-affidavit to foreclosure proceeding. *Sams v. Covington Buggy Co.* 192.
5592. Judgment against partnership, effect of. *Higdon v. Williamson*, 377.
5640. Amendment of answer, after expiration of time for filing answer. *Wilson v. Barnard*, 98.
5650. Forgery of title shown without plea of non est factum, when. *Citizens Bank v. Peebles*, 705.
5664. Jurisdiction not waived, in trover suit, by giving forthcoming bond. *Hall v. Roehr*, 380.
5682. Amendment correcting street number of building, allowed, when. *Heard v. Camp*, 168.
5689. Amendment by substituting another as plaintiff, suing for use of original plaintiff, when allowed. *Dickson v. Matthews*, 542; *Musgrove v. Luther Pub. Co.* 650; *Bales v. Bank*, 703.
5690. See 5689, *supra*.
5691. See 5706, *infra*.
5706. Amendment of affidavit for garnishment; jurisdiction shown by. *Stovall v. Joiner*, 205.
5730. Degree of mental conviction required of jury; no error in charging this section in civil case. *Cen. Ry. Co. v. McGuire*, 483.
5736. Estoppel of creditor to recede from composition. *Stovall Co. v. Shepherd Co.* 498.

CODE SECTIONS—CIVIL—continued.

5746. See 2780, *supra*.
5788. Parol testimony not admissible to add inconsistent terms to written contract. *Campbell v. Alkahest Lyceum System*, 839.
- 5833, par. 5. Subscribing witness need not be produced, where party executing paper testifies to its execution. *Christie v. Shingler*, 529.
5858. Competency of witness, governed by *lex fori*. Crime no disqualification. *Bowers v. So. Ry. Co.* 375.
5883. Credibility of witnesses, proper charge to jury as to. *Cen. Ry. Co. v. McGuire*, 484.
5884. Impeached witness may be believed without corroboration. *Brown v. State*, 50.
5926. Verdict directed, not demanded by evidence, error. *Patrick v. Henderson*, 284.
5927. Verdict not uncertain as to defendants. Surplusage rejected. *Monk-Sloan Co. v. Quitman Oil Co.* 391.
5932. Cited in discussing question as to disqualification of grand juror. *Garnett v. State*, 112. Cited in discussing power of jury. (Dissenting opinion.) *Register v. State*, 640.
5942. Nonsuit proper, where allegations not proved. *Thompson v. Marsh Cypress Co.* 303.
5971. Contribution; law as to control of fl. fa. by codefendant paying, applies to execution against partners. *Higdon v. Williamson*, 377.
5984. Costs in personal actions, provisions of this section as to, not applied to trover, though plaintiff elected to take damages. *Grant v. General Baptist Convention*, 393.
6043. Damage from breach of forthcoming bond; none where property damaged in obligor's possession and delivered by him was worth more than amount due on fl. fa. *Grace v. Finleyson*, 482.
- 6089-93. Brief of evidence; approval refused by judge unable to remember evidence. *Martin v. Mendel*, 421. Judge's duty as to correction of brief. *Id.*
6138. Writ of error premature, as to judgment overruling demurrer to plea, dismissed. *Hyland Chemical Co. v. Goddard*, 13. Premature, as to refusal to allow demand for trial entered; order refusing was not final judgment. *Sharpe v. State*, 213.
6167. Bill of exceptions must be filed with clerk of trial court in 15 days after certification of judge. *Foote & Davies Co. v. Evans Furniture Co.* 194.
6204. First grant of new trial; rule as to, applied. *Wilkins v. Barnes*, 316.
6364. Verdict for lower grade of crime than charged acquits of higher grades, where the accused does not object to it. Judge can not refuse to receive it, though unwarranted. *Register v. State*, 634. Dissent, 635.
6378. Right to bear arms; constitutionality of act of 1910, requiring license to carry pistol, discussed. *Glenn v. State*, 131.
6379. See 473, *supra*.

CODE SECTIONS—CIVIL—*continued*.

6382. See 6364. Jury are judges of law and facts in criminal cases; meaning of this. *Register v. State*, 627.
6391. Repeal of local game law by enactment of general law on the same subject-matter. *Hammond v. State*, 144.
6514. See 5180, *supra*.
6524. Jurisdiction of justice's court; action held to be *ex contractu*, and within jurisdiction; amount claimed not exceeding \$100. *Fine v. So. Express Co.* 164.
6543. Venue of trover suit, county of defendant's residence. *Hall v. Roehr*, 379.
6585. Both exemptions not allowed. *McFarlin v. Reeves*, 581.
- 6644, par. 4. Federal government's control of navigable rivers; State boundary line in river, not affected by change of channel, due to government work to improve navigation. *James v. State*, 16.

CODE SECTIONS—PENAL CODE OF 1910.

19. Assault and battery charged, conviction of assault set aside, where evidence demanded finding of battery. *Kennedy*, 794.
67. Intent of person shooting. *Register*, 640.
71. Fear, as defense; one convicted of manslaughter not hurt by court giving this section in charge. *Carswell*, 27.
72. Shooting into riotous mob invading premises, not assault with intent to murder, here. *Rhodes*, 69.
74. Mutual defense; this section properly given in charge to jury, as applicable to case of father attacking to protect daughter from seduction or debauchery. *Brown*, 56.
110. Kidnapping by enticing, etc.; evidence not warranting conviction, in case of girl under 18 years of age, but of age of discretion, who went off with the accused. *Hendon*, 78.
115. Verdict, "guilty of shooting another unlawfully," not void for uncertainty. *Kidd*, 149. Not necessary for verdict to negative statutory exception. *Id.*
146. Burglary; meaning of "place of business." Indictment sufficient. *Keenan*, 793.
162. Marking or branding animal, distinct offense from altering mark or brand; indictment charging marking by branding, "and by altering," etc., was for one offense. *Lawrence*, 786. Not necessary to describe previous marks. *Id.* Whether necessary to give owner's name. *Id.* 789.
186. Embezzlement by employee of corporation; indictment sufficient; question as to constitutionality of this section, not properly made. *Carr*, 23.
- 216, par. 3. See 781, *infra*.
382. House may be lewd house though devoted chiefly to other purposes. *Fitzgerald*, 70. Knowledge of hotel keeper, as to lewd practices in his hotel, must be shown, to convict him hereunder; reputation and other circumstances sufficient to show such knowledge. *Id.* Not necessary to prove particular act of fornication or adultery. *Id.* 71. This section applied to one

CODE SECTIONS—PENAL—*continued.*

- making executory sale of house afterwards conducted as lewd house, where sold for that purpose. *Kinard*, 133. City ordinance prescribing punishment for allowing house, or part of house, to be occupied as house of ill-fame, invalid, because this section covers the matter. *Cotton v. Atlanta*, 397; *Dannie v. Atlanta*, 471.
393. Policy of law as to protection of minors from vicious habits. *Glenn*, 130.
406. See 393, *supra*.
416. Sunday work of charity or necessity includes contract of prisoner to pay his attorney for services in representing him and securing bond for his release. *Few v. Gunter*, 100.
424. See notes under *Criminal Law*, catchwords "Disturbing school."
426. See notes under *Liquor*.
442. Intoxication manifested by indecent condition, without words or harmful act; "indecent condition" may exist in degree of intoxication. *Ford*, 442.
444. See 393, *supra*. Sale of non-intoxicating malt liquor to minor, unlawful. *Hardu*, 47.
491. See 393, *supra*.
513. Attempt to wreck train. See *Criminal Law*, catchword "Railroad."
522. See 513, *supra*.
586. Game law of 1911 repealed all existing laws on the same subject-matter. *Hammond*, 144.
681. Nuisance; indictment against power company creating pond which caused malaria, etc., sufficient. *Central Georgia Power Co.* 448.
- 720-1. Landlord has no lien for supplies furnished for year preceding that in which the crop was raised. *Robinson*, 791. Relation of vendor and vendee was created by contract here, with notes for "rent," by which payee was obligated to make deed on payment of the notes. *Brundrige*, 816.
729. Cropper's unlawful sale of crop; conviction warranted. *Alexander*, 27.
752. Malice in killing hog, not inferable from absence of fence, here. *Crowder*, 355.
781. Malicious destruction of fence; facts warranting conviction under this section: proper charge to jury. *Woods*, 476. Whether facts made indictable trespass, under § 216, par. 3. *Id.* 477. Presumption of malice. *Id.* 476, 479.
- 943-4. Absence of witness, as ground for continuance; showing incomplete, as to subpoena, etc. *Chatfield*, 40.
954. Indictment stating offense in language of statute, and so plainly that the nature of the offense could be understood, sufficient. *Keenan*, 794.
- 959-60. Forfeiture of recognizance, followed by appearance of principal at sheriff's office in vacation, payment of costs, and execution of new bond, before return term of scire facias; surety discharged. *Fleming v. Smith*, 701.

CODE SECTIONS—PENAL—*continued*.

983. Demand for trial; writ of error premature, as to refusal to allow demand entered; order refusing was not final judgment. *Sharpe*, 213.
987. Postponement of trial, insufficient showing for. *Grusin*, 152.
991. Due diligence not shown by party moving for continuance. *Id.* 151.
1010. Circumstantial evidence; law of, should be charged, without request, where exclusively relied on for conviction. *Bailey*, 829.
1013. Reasonable doubt, failure to charge expressly as to, required new trial. *Norman v. State*, 802. "Reasonable and moral certainty," and "to the exclusion of a reasonable hypothesis," not so easily understood by juries as "beyond a reasonable doubt." *Id.*
1036. See *Criminal Law*, catchwords "Statement of defendant."
- 1037, par. 4. Husband not competent to testify on trial of wife; trial for crime against his person not excepted. *Ector*, 778.
1056. Reversal for not writing charge when requested. *Walker*, 85. Directions not within definition of "charge." *Id.* 87. Notation as to code section, insufficient, where followed by the words: "read if statement made by defendant; erase if none." *Hays*, 823.
1059. See 115, *supra*.

COEMPLOYEES. See *Master and Servant*.

COLLATERAL ATTACK. See *Levy and Sale*.

COLLATERAL SECURITY. See *Garnishment*.

Action by holder on note held as; what recoverable. *Slack v. Elkins*, 571.

COLOR. See *Criminal Law*, catchword "Race."

COMMISSION. See *Principal and Agent*; *Railroad*.

COMMITMENT. See *Criminal Law*.

COMMON CARRIER. See *Railroad*.

COMPARISON OF HANDWRITING. See *Evidence*.

COMPOSITION. See *Debtor and Creditor*.

COMPROMISE. See *Accord and Satisfaction*; *Verdict*.

COMPUTATION OF TIME. See *Time*.

CONCEALMENT. See *Limitations*.

CONCLUSION. See *Evidence*.

CONCLUSIVENESS OF JUDGMENT. See *Judgment*.

CONDITIONAL SALE. See *Sale*.

CONFESSION. See *Criminal Law*.

CONFIDENTIAL COMMUNICATION. See *Evidence*.

CONSENT. See *Trial*.

CONSIDERATION. See *Contract*.

CONSIGNOR AND CONSIGNEE. See *Railroad*.

CONSTITUTIONAL LAW.

Act of 1903 as to sale of stock of goods in bulk, constitutionality of. *Stovall Co. v. Shepherd Co.* 499.

Arms, right to bear; act of 1910, requiring license to carry pistol, constitutional. *Nero v. State*, 23; *Glenn v. State*, 131.

Boundaries between counties, statute providing for determination of disputes as to, constitutional. *Early County v. Baker County*, 305.

Certiorari, constitutional right to, in cases not expressly provided for by statute. *McCore v. Winder*, 385-6.

City court of Newton, act abolishing, unconstitutional. *Cook v. State*, 580.

Class legislation, question as to, not properly made. *Carr v. State*, 22, 23.

Contract obligation not impaired by employer's liability act of 1909. *Chandler v. A. C. L. R. Co.* 191.

Due process of law not denied by law declaring contract ineffectual to release damages. *Id.*

Employer's liability act of 1909, as to acceptance of benefits not relieving from damages, valid. *Id.*

Interstate-commerce law, as affecting legality of contracts for sale of liquor. *Bush v. Hessig-Ellis Co.* 591.

Judicial power; statute not unconstitutional, as being attempt to confer such power on Secretary of State. *Early County v. Baker County*, 305.

Powers judicial and political, separation of. *Id.*

Question as to constitutionality of statute, not properly made; how made. *Carr v. State*, 22, 23. Not raised by allegations which failed to point out wherein body of act differed from title, or wherein it dealt with two subject-matters. *Davis v. Waycross*, 384; *Atkinson v. Hardaway*, 390.

Rights of individuals, power as to restriction of. *Glenn v. State*, 132.

CONSTRUCTION. See *Action*; *Code Sections*; *Contract*; *Pleading*; *Verdict*; *Words and Phrases*.

CONSTRUCTIVE KNOWLEDGE. See *Words and Phrases*.

CONTENTIONS. See *Charge of Court*.

CONTINUANCE.

Absence of party, on account of illness; insufficient showing. *Handley v. Merchants Bank*, 383.

Absence of witness, as ground for; error in refusing. *Patten v. State*, 20. Showing incomplete, as to subpoena, etc. *Chatfield v. State*, 40; *Grusin v. State*, 152. Witness not subpoenaed before leaving the jurisdiction, and no diligence in attempting to procure him; no error in refusing. *Solomon v. State*, 469. Testimony immaterial, no ground to continue. *Farmers Oil Co. v. Sou. Refining Co.* 415.

Amendment, surprise by, as ground for. *Id.*

Attorney's want of time for preparation, not require postponement, here. *Grusin v. State*, 151.

Discretion to be liberally exercised in favor of fair trial, no less than speedy one. *Patten v. State*, 20.

CONTINUANCE—*continued*.

Discretion in refusing to postpone criminal case, not disturbed, unless abused, to injury of defendant. *Grusin v. State*, 149, 152. Not abused. *Byrd v. State*, 214; *Moya v. State*, 215.

Injury to accused should clearly appear, before reversal for refusal to postpone trial. *Grusin v. State*, 152.

Motion for, in criminal case at term at which indictment is found is on different footing from motion at subsequent term. *Patten v. State*, 20.

Preparation for trial, want of time for, as ground for continuance in criminal case. *Grusin v. State*, 149.

Stopping trial, to procure witnesses to meet disclosures of witnesses for opposite party; no abuse of discretion in refusing to stop. *Little v. State*, 826.

Surprise by amendment, as ground for. *Farmers Oil Co. v. Sou. Refining Co.* 415. Not require continuance, in absence of showing that movant was less prepared for trial. *Sartorious v. Paper Mills Co.* 522.

Term at which applied for makes difference, when. *Patten v. State*, 20.

CONTRACT. See *Bond*; *Criminal Law*; *Husband and Wife*; *Insurance*; *Landlord and Tenant*; *Master and Servant*; *Principal and Agent*; *Promissory Note*; *Railroad*; *Sale*; *Statute of Frauds*; *Telegraph Company*; *Timber*; *Title*.

Ability to contract. See catchwords "Dead man," *infra*.

Acceptance. See catchwords, "Offer," "Order," *infra*.

Action, essentials of, not to be enlarged by agreement. *McCord v. Hill*, 254.

Action on, must be brought in name of party in whom legal interest is vested; general rule, and exception. *Dickson v. Matthews*, 543.

Action on quantum meruit in absence of, for service by architect. *Douglas v. Rogers*, 486.

Agency in. See *Principal and Agent*.

Ambiguity in. See catchwords "Certainty," "Construction," *infra*.

Assent of parties to same thing in same sense, wanting, no contract. *Patterson v. G., F. & A. Ry. Co.* 306.

Attorney's fees, contract for. See *Attorney at Law*.

Bond for title, contract construed as, and as creating relation of vendor and vendee, not landlord and tenant. *Brundrige v. State*, 816. Compare *Hodnett v. Mann*, 666.

Breach; agent not liable for breach of warranty. *Pyle v. Booz*, 760.

Breach by notice to seller that buyer will not take goods; remedy of seller. *Linder v. Cole Brothers Co.* 102.

Breach by seller; demand for delivery of goods, when not prerequisite to suit. *McNamara v. Georgia Cotton Co.* 669. By non-delivery of cotton sold; allegations sufficient. *McGhee Cotton Co. v. Herrine*, 700. Buyer's duty to lessen damage by sale of rejected goods arises when. *Salant v. Dannenberg Co.* 265.

Breach, damages for. Difference between contract price and market price, damages for breach of contract of sale, where vendee went into market and bought same kind of goods. *Farmers Oil Co. v. Sou. Refining Co.* 415. Non-delivery of sawmill traction

CONTRACT—*continued*.

- engine; allegations as to expenses in buying timber, hiring laborers to load engine, railroad fare, etc., sufficient, as against demurrer. *Case Threshing Machine Co. v. Ezzell*, 647. Where heating plant installed in building was inferior to that contracted for, measure of damages was sum required to make it conform to contract. *Dornblatt v. Carlton*, 741. Contractor not relieved by offering to make the changes for a specified sum, and to give bond for performance. *Id.* What recoverable for breach of contract to take goods ordered, where seller elects to resell; necessary allegations. *Sims-McKenzie Co. v. Patterson*, 742. Demurrage and broker's charges, as elements of, in suit against purchaser failing to take goods. *Id.*
- Breach; injured party's duty to lessen damage. *Salant v. Dannenberg Co.* 265; *Malloch v. Kicklighter*, 605.
- Breach, right of action for, on renunciation before time for performance. *Cox v. McKinley*, 493.
- Builder's breach of, by inferior work; what recoverable. *Dornblatt v. Carlton*, 741. Effect of offer to make necessary changes for specified sum. *Id.*
- Carrier's contract. See *Railroad*.
- Certainty; maxim, "id certum est quod certum reddi potest," applied. *Citizens Bank v. Benton*, 311. Contract to perform labor at a definite rate during "turpentine season," not too indefinite; meaning of the words could be shown by parol proof. *Peacock v. State*, 402. Uncertainty as to time of payment of consideration. *Murphey v. Creamer*, 593, 598, 603. Too uncertain as to character of work to be performed. *Adams v. State*, 801.
- Commission of broker. See *Principal and Agent*.
- Competency of parties. See catchwords "Dead man," *infra*.
- Composition by creditors with debtor; consideration necessary. *Williams-Thompson Co. v. Williams*, 251-2. Estoppel of creditor to recede from. *Stovall Co. v. Shepherd Co.* 498.
- Consideration, agreement not without. To pay agent for services to be rendered, the nature, extent, and time of which were left to his discretion. *Citizens Bank v. Benton*, 308. Consideration to be paid by purchaser from proceeds or profits of the property bought, not invalid. *Murphey v. Creamer*, 593, 599.
- Consideration, failure of. Plea of total failure includes partial failure; but sufficient data must be given as basis of deduction from price. *Stimpson Specialty Co. v. Parker*, 295. Plea not sustained, as to machine not adapted to purpose for which bought, but retained and not shown to be wholly valueless for any purpose. *Id.*
- Consideration illegal or immoral (cotton futures), shown by parol proof. *McNamara v. Georgia Cotton Co.* 669.
- Consideration inadequate, not invalidate contract. *Hartfelder v. Clark*, 422. Not authorize finding that holder of note was not bona fide purchaser. *Id.*
- Consideration not payable on a definite day, not necessarily invalid. *Murphey v. Creamer*, 593, 598, 603.

CONTRACT—*continued*.

Consideration of note, shown by parol proof. *Nunez Gin & Warehouse Co. v. Moore*, 350.

Consideration, presumption of, from seal. *Williams-Thompson Co. v. Williams*, 253.

Consideration; surety not released by agreement without. *Id.*

Consideration. See catchword "Mutuality," *infra*.

Construction, question for court. *Malloch v. Kicklighter*, 605. Construed most strongly against party preparing it. *Mizell Live Stock Co. v. Banks*, 364. Construed so that all parts may stand together, if possible. *Id.* Construction of terms. See *Words and Phrases*.

Corporation, authority to sign contract for. See *Corporation*.

Cotton, contract as to sale of. See *Sale*.

Custom at variance with, error in admitting testimony as to. *Patapsco Shoe Co. v. Bankston*, 676, 678.

Damages for breach. See catchword "Breach," *supra*, and title *Damages*.

Dead man named as insured, in fire-insurance policy; contract valid, when. *Queen Ins. Co. v. Peters*, 202.

Delivery, stipulation as to. See *Sale*.

Demand for delivery, when not necessary before suit against vendor for breach of contract. *McNamara v. Georgia Cotton Co.* 669.

Description of property in. See *Deed*.

Employment, contract of. See catchword "Mutuality," *infra*; and see title *Master and Servant*.

Entire and not severable contract. *National Duck Mills v. Catlin*, 244. Accord and satisfaction as to separate demands arising therefrom, without affecting the others. *Id.* Entire, for sale of malt, to be delivered in installments. *Acme Brewing Co. v. Rahr Sons Co.* 564.

Execution of; proved by testimony of party executing, without producing subscribing witness. *Christie v. Shingler*, 529. See *Pleading*, catchwords "Non est factum," *infra*.

Executory, for sale of goods. See *Sale*.

Fraud in. See *Fraud*.

Future delivery of goods sold, legality of contract for. See *Sale*.

Guaranty. See *Sale*, catchword "Warranty."

Illegal, assignment of life-insurance, when not. *Volunteer Ins. Co. v. Buchanan*, 255.

Illegal purpose of purchaser, as affecting vendor. *Kinard v. State*, 133.

Illegality, as defense. *McNamara v. Georgia Cotton Co.* 669. Immoral or illegal consideration shown by parol proof. *Id.* Contract valid on its face, not invalidated by showing that one of the parties understood it to be a wagering contract. *Farmers Oil Co. v. Rosenthal*, 416. See *Sale*, catchwords "Future delivery," "Futures."

Illegality. See catchwords, "Interstate," "Levying officer," *infra*.

Implied promise to pay for property appropriated; case not within rule as to. *Dickson v. Matthews*, 543.

Intent of parties, when shown by parol testimony. *McNamara v. Georgia Cotton Co.* 669. And see *Evidence*, catchword "Parol."

CONTRACT—*continued*.

- Interference by stranger with performance; action for, under statute as to contracts of renting, etc. *Rawlings v. Sheppard*, 350.
- Interstate-commerce law, as affecting legality of contracts for sale of liquor. *Bush v. Hessig-Ellis Co.* 589, 591.
- Levying officer's agreement as to disposition of property, contrary to public policy and void, when. *James v. Pepper*, 286.
- Machinery not in accordance with; measure of damages. *Dornblatt v. Carlton*, 741.
- Mutual assent to same thing in same sense, wanting; no contract. *Patterson v. G., F. & A. Ry. Co.* 306.
- Mutuality not wanting in contract to pay agent for services to be rendered, though it left to his discretion the nature, extent, and time of the service. *Citizens Bank v. Benton*, 308. Not wanting in agreement that purchase-price was to be paid from proceeds or profits of the property bought. *Murphey v. Creamer*, 593, 599. When not wanting in contract for sale of cotton. *McGhee Cotton Co. v. Herrine*, 700. When a jury question. *Livingston v. Martin*, 766. Written order for goods, binding without written acceptance, where the goods were shipped. *Case Threshing Machine Co. v. Donalson*, 428.
- Non est factum, as defense. See *Pleading*.
- Notice of claim, stipulation as to time of, as condition of liability. *W. U. Tel. Co. v. Ford*, 606, 620.
- Nudum pactum. See catchword "Consideration," *supra*.
- Offer, acceptance of, by acts. *Case Threshing Machine Co. v. Donalson*, 431. Offer not accepted before withdrawn, no contract existed. *Wilkerson v. Patton Sash Co.* 698. When acceptance must be in writing. *Id.* Memorandum of sale, held to be offer; acceptance made binding contract. *McGhee Cotton Co. v. Herrine*, 700. Offer of price before delivery, when not necessary. *Id.*
- Option to tenant to purchase, contract construed as, where it provided for payment of rent on failure to pay installments of purchase-money. *Hodnett v. Mann*, 666. Compare *Brundrige v. State*, 816.
- Option. See catchword "Offer," *supra*.
- Order for goods; written acceptance of written order, not necessary, to bind purchaser, where the goods were shipped. *Case Threshing Machine Co. v. Donalson*, 428.
- Parties able to contract; rule requiring, not prevent contract (fire-insurance policy) in name of dead man, when. *Queen Ins. Co. v. Peters*, 292.
- Parties to. See catchword "Privity," *infra*.
- Policy of insurance. See *Insurance*.
- Privity; none between A., who furnished material, and C., who had employed B. to do work and had agreed with B. to pay for material to be used in it, B. buying the material, and, without authority, having it charged by A. to C. *Dickson v. Matthews*, 542. Contract between vendor and vendee, with provision for

CONTRACT—*continued.*

- broker's commission; broker's action against vendee, based on, should be in name of vendor, suing for his use. *West v. Morris*, 651.
- Public policy, levying officer's agreement as to disposition of property, contrary to, when. *James v. Pepper*, 266.
- Ratification of. See *Principal and Agent*.
- Release, memorandum here was not. *Malloch v. Kicklighter*, 605.
- Remedy given by statute, not enlarged by agreement. *McCord v. Hill*, 254.
- Renewal note estopped maker from defenses or counter-claims known to him when he made it. *National Duck Mills v. Catlin*, 245.
- Rental, or sale; issue as to which was intended. *Patrick v. Shields*, 506. See *Hodnett v. Mann*, 666; *Brundrige v. State*, 816. And as to rent, see *Landlord and Tenant*.
- Rescission of rent contract, when not result from landlord's renting to third person on tenant's renunciation of contract. *Cox v. McKinley*, 492.
- Sealed, instrument is not, by scroll with L. S. after signature, though attesting clause recite it was sealed. *Waterman v. Barclay*, 108. Presumption from seal, as to consideration. *Williams-Thompson Co. v. Williams*, 253. See *Corporation*.
- Service, contract for, not wanting in mutuality. *Citizens Bank v. Benton*, 308. Implied promise to pay reasonable sum for, to attorney examining title, on employment of agent in sale of land. *West v. Morris*, 651. See *Master and Servant*; *Principal and Agent*, catchword "Commission."
- Severable, contract here was not. *National Duck Mills v. Catlin*, 244.
- Signature, proof of, by comparison with admittedly genuine signature. *Wilson v. Barnard*, 99. Question as to genuineness of signature, not raised by general objection that paper offered in evidence was irrelevant. *Hickman v. Bell*, 320.
- Signing in behalf of another, in his presence. *Outcault Advertising Co. v. American Furniture Co.* 211.
- Signing without reading, induced by fraud; good plea as to. *Chandler-Blackstad Co. v. Price*, 383. Signing without reading, where other party was in haste to catch train; no fraud shown which would entitle signer to relief. *Patapsco Shoe Co. v. Bankston*, 676.
- Speculative intent in; admissibility of testimony as to. *Volunteer Ins. Co. v. Buchanan*, 255. See *Insurance*, catchword "Assignment;" *Sale*, catchword "Futures."
- Sunday note executed by prisoner to his attorney for services in representing him and securing bond for his release, valid. *Few v. Gunter*, 100. Contract made on Sunday invalid, where made in prosecution of business of one of the parties. *Williams v. Allison*, 840.
- Suretyship. See *Husband and Wife*; *Principal and Surety*.
- Time limit not specified, reasonable time implied (to be determined by jury). *Cherry Lake Co. v. Lanier Armstrong Co.* 341. Time for performance of service, during the "turpentine season," not

CONTRACT—*continued.*

too indefinite; meaning shown by parol proof. *Peacock v. State*, 402. Time of payment of consideration, indefiniteness of, as affecting validity. *Murphey v. Creamer*, 593, 598, 603.

Unilateral. See catchword "Mutuality," *supra*.

Wagering, when life-insurance policy, or assignment thereof, is not. *Volunteer Ins. Co. v. Buchanan*, 255. See *Sale*, catchword "Futures."

Warranty. See *Sale*.

Written. See *Evidence*, catchword "Parol;" and see *Statute of Frauds*.

CONTRIBUTION. See *Partnership*.CONVERSION. See *Trover*.CONVEYANCE. See *Deed*; *Fraud*; *Title*.COPY. See *Amendment*; *Evidence*.CORPORATION. See *Municipal Corporation*.

Agent's authority. See *Principal and Agent*.

Authority of general manager to make contract for. *Nunez Gin & Warehouse Co. v. Moore*, 350.

Authority of officer to sign contract for. *Outcault Advertising Co. v. American Furniture Co.* 211.

Bankruptcy; liability of organizers. See catchword "Organizers," *infra*.

Capital stock. See catchwords "Organizers," "Stock," *infra*.

Commencing business before minimum capital subscribed. See catchword "Organizers," *infra*.

Contract admissible in evidence as contract of. *Campbell v. Alkahest Lyceum System*, 839.

Contract by organizers, liability on. *Rosenheim Shoe Co. v. Horne*, 582.

Contract signed in behalf of, in presence of president and under his direction, was *prima facie* the act of the corporation. *Outcault Advertising Co. v. American Furniture Co.* 211.

Creditor's knowledge before extending credit, as affecting right to complain of unauthorized acts of organizers. *Rosenheim Shoe Co. v. Horne*, 582, 586.

Embezzlement by employee. See *Criminal Law*.

"General manager," authority of, what implied. *Nunez Gin & Warehouse Co. v. Moore*, 350.

Letters of officer, when admissible against corporation. *Farmers Oil Co. v. Rosenthal*, 416.

Non-resident. See catchword "Residence," *infra*.

Officer's authority to make note for. *Nunez Gin & Warehouse Co. v. Moore*, 350.

Official designation, presumption from, as to authority. *Id.*

Organizers beginning before minimum capital stock subscribed; liability of. *Rosenheim Shoe Co. v. Horne*, 582. Liability in favor of creditors, not in favor of the corporation, and not enforceable by trustee in bankruptcy of corporation. *Id.*

Partnership liability of organizers. *Id.*

"Person" includes corporation, in Civil Code, § 4413, as to liability of master for tort of servant. *L. & N. R. Co. v. Hudson*, 171.

CORPORATION—*continued*.

Promoters, liability of. *Rosenheim Shoe Co. v. Horne*, 582.

Purchase of engine and boiler presumed to be within authority of general manager of gin and warehouse company. *Nunez Gin & Warehouse Co. v. Moore*, 350.

Residence of, not changed by removal to another State. *Cooper v. Most Nursery Co.* 354.

Seal not required on transfer of note by. *Christie v. Shingler*, 529. Record silent as to whether attached to paper admitted in evidence; paper treated as if seal was attached. *Id.*

Stock; purchase of its own stock, officer without power to make for. *Nunez Gin & Warehouse Co. v. Moore*, 350.

Stock; meaning of "minimum capital stock." *Rosenheim Shoe Co. v. Horne*, 582. Liability, where business begins before minimum subscribed. *Id.*

Stock subscriptions, time for paying. *Id.* 585, 586.

Tort, liability for; national bank not liable for wrongful prosecution. *Hansford v. Nat. Bank of Tifton*, 270.

CORPSE. See *Cemetery*.

CORPUS DELICTI. See *Criminal Law*.

COSTS.

Attorney's fees claimed in suit on insurance policy, whether damages or costs. *Queen Ins. Co. v. Peters*, 290, 291.

Judgment for, in justice's court, when proper. *Thomas v. Monticello Vehicle Co.* 260.

Personal actions, statute limiting plaintiff's recovery of costs in, not applied to trover, though plaintiff elected to take damages. *Grant v. General Baptist Convention*, 393.

Question as to, not properly raised in appellate court, by presenting a ground not included in motion in court below, to tax costs. *Id.* 392.

COTTON. See *Principal and Agent*, catchword "Factor." *Sale*.

COUNSEL. See *Attorney at Law*.

COUNT. See *Criminal Law*, catchword "Indictment."

COUNTER-CLAIM. See *Estoppel*; *Pleading*, catchwords "Set-off;" *Principal and Agent*.

COUNTIES.

Boundary line between, disputed; statute providing for determination of, by Secretary of State, constitutional. *Early County v. Baker County*, 305.

Bridge; colt's foot injured by slipping through hole at edge of bridge, not dangerous for horse; issues as to negligence of county, and contributory negligence of owner in allowing colt to follow horse, were for jury. *Greene County v. Walker*, 347.

COURTS. See *City Court*; *Judge*; *Jurisdiction*; *Justice's Court*; *Municipal Corporation*; *Practice in Court of Appeals*; *Trial*.

CREDITORS. See *Debtor and Creditor*.

CRIMINAL LAW. See *Code Sections—Penal*.

Abandonment of child. See catchword "Child," *infra*.

Abatement; disqualification of grand juror, no ground for plea. *Garnett*, 109, 112. Plea alleging disqualification of prosecuting officer, not entertained. *Bush*, 544. Plea in abatement to accusation; filed in due time. *Id.* 545.

Abduction. See catchword "Kidnapping," *infra*.

Absence of judge during part of trial, effect of. *Brantley*, 24; *Martin*, 455.

Accessories; none in misdemeanors; all participants are principals. *Hardu*, 48; *Toles*, 444; *Wynne v. Atlanta*, 818.

Accident, evidence requiring charge to jury on theory of, on trial for assault. *Conoly*, 822.

Accusation; affidavit of prosecutor, as basis of. *Eady*, 818. Amendment of accusation; objection as to time of, too late. *Whipple*, 214. Accusation of violation of ordinance, what sufficient. *Wynne v. Atlanta*, 818. See catchword "Indictment," *infra*.

Acquittal of higher grade charged, resulted from verdict for lower grade, though judge refused to receive it. *Register*, 623. Dissent, 635.

Admission. See catchword "Confession," *infra*.

Affray; defense unduly restricted by charge of court. *Bracewell*, 830.

Alteration of indictment, not matter for demurrer. *Gunn*, 819.

Altering mark on animal. See catchword "Animal," *infra*.

Alibi. Omission to charge jury on, without request, not cause reversal. *Solomon*, 469. Evidence not requiring charge to jury on. *Shaw*, 776. No error in charge on. *Dowdell*, 835.

Amendment of accusation; objection too late as to time of amendment. *Whipple*, 214.

Animal; marking or branding, distinct offense from altering mark or brand; indictment charging marking by branding, "and by altering," etc., was for one offense. *Lawrence*, 786. Whether necessary to allege ownership, in indictment for marking; allegation as to, must be proved. *Id.* See catchword "Hog," *infra*.

Arms, carrying unlawfully. See catchword "Pistol," *infra*.

Arrest, assault on officer making; when not justifiable. *Smith*, 36.

Arrest unlawful, not defined in charge of court; no error, in absence of request. *Renfro*, 38.

Arrest; voluntary surrender, accused not allowed to show. *Register*, 623.

Arrest without warrant, officer's right to make, for offense committed in his presence; cursing by persons seen by approaching officer, held to be in his presence, though not heard by him. *Smith*, 37.

Arson; presumption of accidental burning. *Matthews*, 302; *Childs*, 829. Not rebutted, and evidence insufficient as to motive; conviction set aside. *Matthews*, 302. Corpus delicti must be shown by evidence aliunde confession or incriminatory admission. *Childs*, 829.

Assault and battery, evidence warranting conviction. *Brantley*, 24. Assault and battery charged, conviction of assault set aside, where evidence demanded finding of battery. *Kennedy*, 794. See catchword "Rape," *infra*.

CRIMINAL LAW—*continued.*

Assault; failure to prosecute in municipal court for disorderly conduct, irrelevant, on trial for. *Butler*, 483.

Assault on officer approaching to arrest without warrant; evidence warranting conviction. *Smith*, 37.

Assault to murder, by throwing rock. *Id.* When not committed by one shooting into riotous mob invading his premises. *Rhodes*, 68. Distinguished from offense of shooting at another. *Hunter*, 832. Intent to kill not presumed where death not result. *Id.*

Assault to rape. See catchword "Rape," *infra*.

Assault, words as justification for, not include written words. *Haygood*, 394.

Assault. See catchword "Homicide," *infra*.

"Assemblage or meeting" of school, meaning of, in statute as to disturbing school. *Harwell*, 115.

"At," meaning of, in penal statute. *English*, 791.

Attempt to wreck train. See catchword "Railroad," *infra*.

Autrefois acquit, or autrefois convict. See catchwords "Former jeopardy," *infra*.

Bar of prosecution, by statute of limitations; no such concealment shown as to arrest bar. *Harris*, 366.

Battery. See catchwords, "Assault and battery," *supra*.

Bigamy; evidence sufficient to convict. *Sewell*, 451.

Branding animal. See catchword "Animal," *supra*.

Burglary; presumption from possession of stolen goods, error in omitting element of recency, in charging jury as to, harmless, in view of undisputed facts. *Rayfield*, 48. Circumstances sufficient as to corpus delicti. *Garnett*, 114. Description of stolen property in indictment: "35 pounds of middling meat," value, and name of owner, sufficient. *Shaw*, 776. Meaning of "place of business," in statute as to. *Keenan*, 792. Indictment sufficient. *Id.*

Cattle; branding, or altering mark. *Lawrence*, 786.

Character of accused; no error in charge to jury as to effect of evidence of good character. *Grusin*, 153.

Charge of court. See that title.

Cheating and swindling, by obtaining money on worthless check, not committed without representation as to fund to pay the check, or that it would be paid on presentation; indictment not alleging such representation, fatally defective. *Williams*, 395. Evidence not sufficient to convict. *O'Neal*, 474. Ownership of money obtained and name of person defrauded should be alleged and proved. *Id.* Party defrauded here was bank, not cashier, though the money was obtained from him and he afterwards paid the bank. *Id.*

Cheating and swindling; conviction not authorized by representation not shown to have deceived, in sale of horse with patent defect. *Odum*, 27. Evidence slight as to material element of case, but not legally insufficient. *Thomas*, 142.

CRIMINAL LAW—*continued*.

- Cheating and swindling under "labor-contract act" of 1903. Error in charging jury that on proof of enumerated acts deemed presumptive evidence of intent to defraud, the burden of proving innocence would be shifted to defendant. *Fuller*, 117. Statute to be so construed as not to render it repugnant to State or Federal constitution. *Id.* 118. Contract to perform labor at a definite rate during "turpentine season," not too indefinite; meaning of the words could be shown by parol proof. *Peacock*, 402. Contract not clear and definite in its terms (as to character of work); conviction set aside. *Adams*, 801. Fraudulent intent not shown. *Harris*, 835.
- Check worthless; what necessary to constitute cheating and swindling by giving. *Williams*, 395; *O'Neal*, 474.
- Child abandonment; essentials of the offense; it continues, and statute of limitation does not begin to run, so long as desertion and non-support of dependent child continue. *Phelps*, 41. Immaterial that defendant was driven from home and his life threatened by wife and father-in-law. *Parrish*, 836. Venue not proved. *Id.* Conviction warranted. *Brown*, 457.
- Child. See catchword "Kidnapping," *infra*.
- Circumstantial evidence. See catchwords as to particular offenses, and title *Charge of Court*.
- City ordinance held invalid because a penal law of the State covers the matter (punishment for allowing house, or part of house, to be occupied as house of ill-fame). *Cotton v. Atlanta*, 397; *Dannie v. Atlanta*, 471.
- Color of accused. See catchword "Race," *infra*.
- Commitment, irregularity in, not matter for plea to jurisdiction. *Boatright*, 29.
- Confession. Corpus delicti proved by circumstantial evidence coupled with incriminatory admission. *Garnett*, 109; *Stanley*, 153. Not alone proof of corpus delicti. *Childs*, 829. Inducement by promise not to hurt a hair of defendant's head if he would tell the truth, etc. *Garnett*, 111. Inducement not exclude incriminatory admission leading to discovery of confirmatory circumstances, when. *Id.* 109.
- Contract of laborer with intent to defraud. See catchwords "Cheating and swindling under labor-contract act," *supra*.
- Corpus delicti, meaning of. *Garnett*, 114. Not shown by confession alone. *Childs*, 829. Shown by circumstantial evidence coupled with incriminatory admission. *Garnett*, 109; *Stanley*, 153. Sufficient proof of, as to larceny. *Id.* 7; *Boatright*, 29. As to burglary. *Garnett*, 114.
- Crimination of self. See catchword "Confession," *supra*, and title *Evidence*.
- Crop, unlawful sale of; conviction warranted. *Alexander*, 27. Sale not criminal, here. *Robinson*, 791; *Brundrige*, 816.
- Death, cause of. See catchword "Homicide," *infra*.
- Declarations of deceased persons. See catchwords "Dying declarations," *infra*.

CRIMINAL LAW—*continued*.

- Degree of crime. See catchword "Grades," *infra*.
- Demand for trial; writ of error premature, as to refusal to allow demand entered; order refusing was not final judgment. *Sharpe*, 212; *Maples v. State*, 786.
- Disorderly house. See catchwords "Lewd house," *infra*.
- Disturbing school; statute not violated by disturbing sleight-of-hand performance of traveling performer in school-house, though part of proceeds was to go to school purposes. *Harwell*, 115. Statute not applicable where assemblage is for purpose not connected with exercises pertaining to school. *Id*.
- Doubt as to guilt. See *Charge of Court*, catchwords "Reasonable doubt."
- Drunkenness. See catchword "Intoxication," *infra*.
- Duplicity in indictment. *Lawrence*, 786, 788.
- Dying declarations; credibility of declarant, attacked by proof of general bad character, etc.; error in not charging jury as requested on rules governing credibility. *Robinson*, 462. Error in charge on. *Id*.
- Embezzlement by employee of corporation; indictment sufficient; question as to constitutionality of statute, not properly made. *Carr*, 21.
- Escape. See catchword "Flight," *infra*.
- Fear, as defense. See catchword "Homicide," *infra*.
- Fence destroyed; facts warranting conviction, under code section as to malicious mischief. *Woods*, 476.
- Fine, defendant entitled to reasonable time to pay, under alternative sentence; tender to sheriff, sufficient, though prisoner was in chain-gang. *Abram v. Maples*, 137.
- Firearms. See catchword "Pistol," *infra*.
- Flight, accused not allowed to prove he did not attempt. *Register*, 623.
- Forcible entry and detainer, what necessary to constitute. *Cate v. Knight*, 665.
- Former jeopardy, plea of, can not be based on trial under void accusation. *Renfro*, 38. When former verdict bars prosecution though not received by the court. *Register*, 623, 630.
- Fornication. See catchwords "Lewd house," *infra*.
- Fraud. See catchword "Cheating," *supra*.
- Game law of 1911 repealed all existing laws, general, special, or local, on the same subject-matter. *Hammond*, 143.
- Gaming; case controlled by *Twilley v. State*, 9 Ga. App. 435. *Tyus*, 23.
- Good faith, claim of ownership not conclusive evidence of, in case of one charged with malicious injury to another's fence. *Woods*, 476.
- Grades of crime; judge has no authority to refuse to receive verdict for lower grade than charged, where the accused does not object, though the verdict be unwarranted. *Register*, 623. Dissent, 635.
- Grand juror. See *Jury*.
- Hog, malicious killing of; evidence not warranting inference of malice. *Crowder*, 355.
- Hog-stealing; conviction set aside for lack of evidence of animus furandi. *Williams*, 142.

CRIMINAL LAW—*continued.*

Homicide. Fear, as defense; one convicted of manslaughter not hurt by court giving in charge code section on this subject. *Carswell*, 27. Provocation by words, etc.; no error in charging as to. *Id.* 30. Slayer's statement, after walking from place of killing to opposite side of street, that he "had to do it," no part of *res gestæ*. *Id.* Seduction or debauchery of daughter, cause of attack; instructions to jury. *Brown*, 50. Shooting to repel invasion of premises by riotous mob. *Rhodes*, 68. Relative size and strength of the parties, and violent character of one; no error in not charging jury as to, without request. *Langston*, 85. Opinion of physician, that death would soon follow wound, admissibility of. *Id.* 84. By shooting opposite party in quarrel, while he was approaching with hand in pocket; conviction of manslaughter affirmed. *Young*, 116. Expert testimony not necessary, to authorize finding that cause of death was blow inflicted by deadly weapon several days before death. *Brown*, 216. "Cooling time," whether sufficient, a jury question. *Robinson*, 463. Prima facie case of murder made out by proof of killing in manner alleged in indictment; no error in charge to jury as to this. *Rickerson*, 464. Testimony that the described location of the fatal wound indicated the position of the deceased when shot, admitted; not material error. *Rivers*, 487. Verdict for lower grade than charged acquits of higher grades, and is a finality, where the accused does not object to it. Judge can not refuse to receive it, though not supported by evidence. Subsequent verdict for higher grade set aside. *Register*, 623. Dissent, 635. See catchwords, "Dying declaration," *supra*; "Manslaughter," *infra*.

Hunting. See catchword "Game," *supra*.

Husband not competent to testify on trial of his wife. *Ector*, 777.

Identification by prisoner's statement to jury, not render thing admissible as evidence. *Register*, 623.

Impeaching testimony, no ground for setting aside conviction. *Holloway*, 49.

Indictment, alteration of, not matter for demurrer. *Gunn*, 819.

Indictment; description of stolen seed cotton, insufficient. *Bright*, 17.

Indictment, exception to ruling on demurrer to, not properly made in motion for new trial. *Mack*, 835.

Indictment for nuisance, sufficient. *Central Georgia Power Co.* 448.

Indictment for perjury, sufficient. *Broadwater*, 458.

Indictment; grand juror's disqualification, no ground for plea in abatement. *Garnett*, 109, 112.

Indictment in two counts, charging different offenses which are separate transactions; general verdict of guilty set aside, where the evidence supports only one of them. *Morse*, 61, 66. Indictment with bad count and good count; court may strike the bad, without quashing the whole. *Martin*, 795.

Indictment joining different offenses in one count, when proper. *Lawrence*, 788. Two offenses not joined, where facts constituting a second offense were alleged merely as matter of inducement, describing the manner of committing the main offense. *Id.*

CRIMINAL LAW—*continued*.

Indictment not too indefinite as to kind of intoxicating drinks sold. *Howe*, 215.

Indictment, rule as to when sufficiently specific. *Central Georgia Power Co.* 449.

Indictment transferred to city court, superior court lost jurisdiction. *Cook*, 580. Jurisdiction not changed by unconstitutional statute. *Id.*

Indictment, unnecessary allegation in, as to ownership, must be proved. *Lawrence*, 789.

Indictment void, defect not waivable; trial thereon no basis for plea of former jeopardy. *Renfro*, 38.

Injury to property. See catchword "Property," *infra*.

Intent of purchaser to use property for unlawful purpose, as affecting seller. *Kinard*, 133.

"Into," meaning of, in penal statute. *English*, 791.

Intoxication in residence of another, manifested by indecent condition, without words or harmful act; "indecent condition" may exist in degree of intoxication. *Ford*, 442.

Invasion of premises by riotous mob; when justification for shooting. *Rhodes*, 68.

Involuntary manslaughter. See catchword "Manslaughter," *infra*.

Irregularity in trial, presumption of harm from. *Martin*, 456-7.

Jeopardy. See catchwords "Former jeopardy," *supra*.

Joinder of offenses. See catchword "Indictment," *supra*.

Judge's improper remarks before jury. See *Charge of Court*, catchword "Opinion;" *Jury*; *Trial*.

Judgment. See catchword "Punishment," *infra*.

Jurisdiction not proved. See catchword "Venue," *infra*.

Jury. See that title.

Keeping for unlawful sale. See *Liquor*.

Keeping lewd house. See catchwords "Lewd house," *infra*.

Kidnapping by enticing, etc.; evidence not warranting conviction, in case of girl under 18 years of age, but of age of discretion, who went off with the accused. *Hendon*, 78.

Larceny after trust by servant receiving money from employer to be changed, and not returning change or money. *Basley*, 470.

Larceny; corpus delicti shown. *Boatright*, 29. Circumstances suspicious, but not sufficient to warrant conviction. *Mathis*, 77. No evidence of animus furandi; conviction set aside. *Williams*, 142. Corpus delicti sufficiently shown by circumstantial evidence, in connection with incriminatory admission. *Garnett*, 114; *Stanley*, 153. Circumstances sufficient to convict. *Gurley*, 841.

Larceny; description of stolen seed cotton, by giving weight and value, insufficient. *Bright*, 17. Description of property sufficient. *Shaw*, 776. See catchwords, "Burglary," *supra*; "Money," *infra*.

Larceny; evidence properly confined to count of indictment which charged larceny from house. *Byrd*, 214.

Larceny from house, by taking thing from front porch. *Downer*, 827.

CRIMINAL LAW—*continued*.

- Larceny from person not committed by taking money from one with his knowledge. *Stewart*, 442.
- Larceny; indictment with count charging larceny, and count charging the receiving of stolen property; court could strike the latter without quashing the whole. *Martin*, 795.
- Larceny; no error in allowing proof of defendant's possession of other stolen articles, with property described in indictment. (Dis-sent.) *Id.*
- Larceny; presumption from recent possession of stolen goods, error in omitting word "recent" from charge, harmless here. *Rayfield*, 48.
- Larceny; search of person, admissibility of evidence obtained by. See catchword "Search," *infra*.
- Larceny simple distinguished from larceny after trust, in case of one receiving money to be changed. *Basley*, 470.
- Larceny; value shown by fact that the goods taken had been sold, though price or quantity not proved. *Tolver*, 33. Error in admitting proof as to, not require new trial, when. *Id.* 34.
- Larceny. See catchwords, "Burglary," "Embezzlement," *supra*.
- Lewd character of woman, how shown; admissibility of language used by her. *Fitzgerald*, 71, 74, 75.
- Lewd house; house may be though devoted chiefly to other purposes. *Fitzgerald*, 70. Knowledge of hotel keeper, as to lewd practices in his hotel, must be shown, to convict him of maintaining lewd house; reputation and other circumstances sufficient to show such knowledge. *Id.* Not necessary to prove particular acts of fornication or adultery. *Id.* 71. Reputation of keeping, not alone sufficient to convict. *Watson*, 794. Offense of maintaining, by executory sale of house afterwards conducted as lewd house, where sold for that purpose. *Kinard*, 133. City ordinance prescribing punishment for allowing house, or part of house, to be occupied as house of ill-fame, invalid, because State law covers the matter. *Cotton v. Atlanta*, 397; *Dannie v. Atlanta*, 471.
- License (U. S.) for sale of liquor, evidence as to violation of State liquor law. *Cassidy*, 123; *Jackson*, 143.
- Limitation of prosecution. See catchword "Bar," *supra*.
- Liquor, violation of law as to. See *Liquor*.
- Malice, presumption of, in case of destruction of another's fence. *Woods*, 476, 479.
- Malicious killing of hog; malice not inferable from absence of fence, here. *Crowder*, 355.
- Malicious mischief. See catchword "Property," *infra*.
- Manslaughter. By shooting another in quarrel, when he approached with hand in pocket. *Young*, 116. Law of voluntary manslaughter involved, in view of evidence as to assault with deadly weapon by the deceased on the accused. *Robinson*, 463. Whether sufficient "cooling time" had elapsed, a jury question. *Id.* No error in charging jury on law of voluntary manslaughter. *Carswell*, 27. Charge required when. *Brown*, 50. Harm-

CRIMINAL LAW—*continued*.

less error in charging on. *Kidd*, 149. Law of, applicable to reasonable deductions from the evidence. *Rivers*, 487. Error to charge on, where the State's evidence made a case of murder, and the defendant's statement showed justification. *Ponder*, 834. Evidence as to mutual intent to fight authorized court to charge on. *Smith*, 840. Conviction of voluntary manslaughter warranted. *Wooten*, 78; *Langston*, 82; *Rickerson*, 484; *Montgomery*, 801. Facts not authorizing instruction on involuntary manslaughter. *Carswell*, 30, 32. Verdict of "involuntary manslaughter" means the higher grade. *Register*, 623. Judge can not refuse to receive verdict for lower grade, to which the accused does not object, though unwarranted. *Id.* Dissent, 635. See catchword "Homicide," *supra*.

Marking animal, or changing mark. *Lawrence*, 786.

Minor, sale of non-intoxicating malt liquor to, unlawful. *Hardu*, 47.

Minors are wards of the police power of the State; policy as to protection of, from evil conduct or formation of vicious habits. *Glenn*, 128.

Misnomer, judge's decision on plea of, based on interpretation of handwriting in indictment, final. *Gunn*, 819.

Mistrial. See *Trial*.

Money taken; "greenback money" held to mean currency of the United States. *Jones*, 59.

Motive, evidence insufficient as to, in arson case. *Matthews*, 302.

Municipal ordinance and State law covering same act. *Cotton v. Atlanta*, 397; *Dannie v. Atlanta*, 471.

Murder. See catchword "Homicide," *supra*.

Name. See catchword "Misnomer," *infra*.

Nuisance; indictment against power company creating pond which caused malaria, etc., sufficient. *Central Georgia Power Co.* 448.

Officer's qualification to act. See catchword "Solicitor," *infra*.

Officer's right to arrest without warrant. See catchword "Arrest," *supra*.

Opprobrious words. See catchword "Words," *infra*.

Other criminal transactions, admissibility of testimony as to. *Martin*, 797. Possession of other stolen property. *Id.*

Ownership, unnecessary allegation as to, must be proved. *Lawrence*, 789. Whether necessary to allege, in indictment for marking animal. *Id.*

Parent's right to protect daughter from seduction or debauchery. *Brown*, 50.

Perjury; indictment sufficient, as to administration of lawful oath, etc. *Broadwater*, 458. Oath before municipal body, as basis of prosecution. *Id.* Form of oath. *Id.* 461. Oath could be administered by any one of commissioners constituting municipal court. *Id.* 458. Or by attorney authorized by court. *Cain*, 473. In such case the indictment may allege that the court administered the oath. *Id.* 473. Materiality of alleged false testimony should appear in indictment. *Broadwater*, 459. The lan-

CRIMINAL LAW—*continued.*

- guage alleged need not be proved literally; substantial proof sufficient. *Cain*, 473.
- Pistol-carrying without license. Act of 1910 as to, constitutional. *Nero*, 23; *Glenn*, 131. Evils from. *Id.* Minor under 18 years of age can not legally carry pistol, either with or without license. *Id.* 128. Statutory exception as to "place of business," not apply in case of cropper with pistol at landlord's dwelling. *Boyd*, 451. Statute violated by carrying pistol to owner, who had left it at defendant's home. *Cheney*, 451. Convictions upheld. *James*, 13; *Wilcox*, 122.
- Pistol pointing. See catchword "Weapon," *infra*.
- "Place of business," meaning of. *Boyd*, 451; *Keenan*, 792. And see title *Liquor*.
- Police power as to minors. *Glenn*, 128.
- Polling jury. See *Jury*.
- Possession of liquor at place of business. See *Liquor*.
- Possession of stolen goods, presumption from; error in omitting element of recency, in charging jury as to, harmless, in view of undisputed facts. *Rayfield*, 48. Possession of other stolen articles, with property described in indictment; no error in allowing proof of, on trial for larceny. (Dissent.) *Martin*, 795.
- Presence of officer, when act will be held to be committed in. *Smith*, 37.
- Presumption of intent to kill; none where no death. *Hunter*, 831.
- Presumptive evidence of fraudulent intent, error in charge as to effect of, in requiring defendant to prove innocence. *Fuller*, 117.
- Property, malicious injury to; facts warranting conviction; proper charge to jury. *Woods*, 476. Claim of ownership, not conclusive of good faith. *Id.* Presumption of malice, *Id.* 476, 479.
- Prosecuting officer. See catchword "Solicitor," *infra*.
- Punishment. Sentence where general verdict is rendered on indictment containing different counts. *Morse*, 66. Sentence of police court not void for uncertainty because not dated and place of punishment (hard labor) not stated. *Clark v. Trippe*, 467. Amendment to cure alleged uncertainty of sentence, allowed. *Id.* Suspension of sentence, unauthorized. *Daniel v. Persons*, 830. Judge's testimony as to what he meant by sentence, irrelevant, when. *Abram v. Maples*, 139, 141. Sentence too hastily pronounced, where pronounced immediately on announcement of verdict, and before polling of jury could be demanded. *McCullough*, 403. See catchword "Fine," *supra*.
- Race, and social customs founded thereon, jury may consider, in determining whether assault by negro man on white woman was made with intent to rape. *McCullough*, 403.
- Railroad; attempt to wreck train. Indictment sufficient; description of train not required. *Turner*, 18. Indictment not duplicitous. *Wilson*, 67. Ownership of train need not be alleged. *Id.* Proof of railroad company's possession of track sufficient, as to ownership. *Turner*, 18. Immaterial that Georgia Railroad was corporation. *Wilson*, 67. Facts warranting conviction. *Turner*, 18.

CRIMINAL LAW—*continued*.

Rape, assault with intent to commit, committed by making assault to induce consent to sexual intercourse by girl under age of consent. *Gibson*, 117. Instruction to jury, on assault and battery, when required; sufficient instructions. *McCullough*, 403. Conviction of simple assault, proper here. *Campbell*, 795. Difference in color and social status, as affecting question of intent. *McCullough*, 403.

Reasonable doubt. See *Charge of Court*.

Recognizance. See *Bond*.

Reputation, proof of, as tending to show criminal knowledge of proprietor of house, as to lewd practices in it. *Fitzgerald*, 71. Not alone sufficient to convict. *Watson*, 794.

Res gestæ. See *Evidence*.

Robbery; allegation that "lawful money" was taken, sustained by proof that "greenback money" was taken. *Jones*, 59.

Sale, legality of, as affected by interstate-commerce law. *Bush v. Hesseig-Ellis Co.* 589, 591.

Sale of house to be conducted as lewd house. *Kinard*, 133.

Sale unlawful of crop; facts warranting conviction. *Alexander*, 27. Conviction not warranted. *Brundrige*, 816.

Sale. See catchwords "Cheating and swindling," *supra*.

School, disturbance of. See catchwords "Disturbing school," *infra*.

Search of person under illegal arrest, admissibility of evidence obtained by. *Byrd*, 214.

Seducer, parent's right to attack. *Brown*, 50.

Self crimination. See catchwords "Confession," "Search," *supra*, and title *Evidence*.

Sentence. See catchword "Punishment," *supra*.

Separation of jurors. See *Jury*.

Sequestration of witness, objection to violation of rule as to, waived by not making it in due time. *Collins*, 34.

Shooting at another; verdict, "guilty of shooting another unlawfully," not void for uncertainty. *Kidd*, 148. Distinguished from assault with intent to murder; evidence warranting conviction. *Hunter*, 831.

Shooting "at" or "into" dwelling; offense committed by person inside shooting at floor. *English*, 791.

Shooting into mob invading premises, when justifiable. *Rhodes*, 68.

Solicitor, qualification to act as, not properly brought in question by plea in abatement to accusation. *Bush*, 544. Solicitor's removal from county, not vacate office before judicially ascertained. *Id.*

Statement of defendant on trial can not be read to jury by his attorney in lieu of himself. *Brown*, 50. Right of court to interrupt defendant while stating wholly irrelevant matters, and to direct him to confine statement to the case. *Jordan*, 218. Statement of defendant not a proper means of identifying or showing genuineness of things referred to, as preliminary to introducing them in evidence. *Register*, 623. Statement as basis for instruction. *Brown*, 50. No error in charging jury that they may

CRIMINAL LAW—*continued*.

- believe the statement in preference to the sworn testimony, "provided they believe it to be the truth." *McCullough*, 405.
- Stealing. See catchwords, "Burglary," "Larceny," *supra*.
- Sunday; place of business does not cease to be such while closed on Sunday. *Landreth*, 401.
- Sunday work of charity or necessity includes contract of prisoner to pay his attorney for services in representing him and securing bond for his release. *Few v. Gunter*, 100.
- Surrender voluntary; accused not allowed to show. *Register*, 623.
- Time for payment of fine. *Abram v. Maples*, 137.
- Time of offense, conviction not set aside for failure to prove, unless the point is specifically made in motion for new trial (since act of 1911). *Wall*, 136.
- Title, proper instruction to jury as to, on trial of one charged with maliciously destroying fence. *Woods*, 476.
- Transferred case; jurisdiction of superior court lost by transferring indictment to city court. *Cook*, 580.
- Trespass; whether facts made case of indictable trespass, or of malicious mischief. *Woods*, 477.
- Venue. Point on bridge over Savannah river, held to be in this State. *James*, 13. Sufficient proof of. *Garnett*, 110, 114; *Peacock*, 402; *Rickerson*, 464. Insufficient evidence as to. *Parrish*, 836. Newly discovered evidence as to, not require new trial, here. *Campbell*, 790. Venue of offense against municipality. See *Municipal Corporation*.
- Verdict, as acquittal of higher grade, where not received by judge. *Register*, 623.
- Verdict; effect of general verdict on indictment in two counts. *Morse*, 61, 66.
- Verdict of "involuntary manslaughter" means the higher grade. *Register*, 623.
- Verdict; refusal to receive verdict for lower grade than charged, because not warranted, error, where accused does not object to the verdict. *Id.* Dissent, 635.
- Waiver of objection, by delay. *Kidd*, 148; *Whipple*, 214.
- Warrant, arrest without. See catchword "Arrest," *supra*.
- Weapon; pointing weapon at another; indictment void for lack of essential allegations. *Renfroe*, 39. Evidence warranting conviction. *Id.*
- Weapon. See catchword "Pistol," *supra*.
- Wife-beating; conviction warranted. *Slade*, 802.
- Wife, husband not competent witness against, on her trial for crime; crime against his person not excepted. *Ector*, 777.
- Witnesses. See *Continuance*; *Evidence*; *Witness*.
- Words, as justification of assault, not include written words. *Haygood*, 394. As provocation of homicide. See catchword "Homicide," *supra*.
- Words constituting conduct, not excluded under hearsay rule, when *Fitzgerald*, 71, 75.

CRIMINAL LAW—continued.

Words, profane, in presence of female; facts authorizing conviction; charge of court, giving code section partly inapplicable, not require reversal, though better to read only the part applicable. *Hays*, 823.

Wrecking railroad train. See catchword "Railroad," supra.

CROP AND CROPPER. See *Criminal Law*; *Landlord and Tenant*.

CUSTOM. See *Evidence*; *Insurance*; *Landlord and Tenant*; *Master and Servant*.

DAMAGES. See *Master and Servant*; *Municipal Corporation*; *Negligence*; *Railroad*; *Slander*; *Trover*.

Advice negligent, of agent to principal; liability of agent. *Nat. Produce Co. v. Cairo Melon Growers Asso.* 338.

Agent, damages against, on account of defects in goods purchased for principal; when not recoverable by principal. *National Duck Mills v. Catlin*, 240.

Agent's failure to sell when directed; damages recoverable. *Frost v. Powell*, 95.

Agent's negligent advice; recovery by principal. *Nat. Produce Co. v. Cairo Melon Growers Asso.* 338.

Agent's sale in violation of instruction; what recoverable. *Wood v. Jones*, 735. Damages set off. *Frost v. Powell*, 95.

Amount of verdict. See *Verdict*.

Annuity table, proper charge to jury as to mode of using, in case of permanent injury. *Central Ry. Co. v. McGuire*, 485.

Bad faith, in refusing to pay insurance, not shown; verdict for damages not authorized. *Queen Ins. Co. v. Peters*, 289.

Bond, damages from breach of. See *Bond*.

Builder's inferior work; measure of damages for breach of contract; effect of offer to make necessary changes for specified sum. *Dornblatt v. Carlton*, 741.

Cause proximate. See *Negligence*.

Cemetery lot wrongfully entered upon, and body disinterred; what recoverable. *McDonald v. Butler*, 845.

Child's homicide, damages for. *Fuller v. Inman*, 680.

Circumstances of parties, error in charging jury as to consideration of. *So. Ry. Co. v. Cartledge*, 523.

Contingency not too remote, as basis of; probability of performance of duty, in compliance with direction. *Cronheim v. Postal Tel. Co.* 716, 725.

Contract, damages for breach of. See *Contract*, catchword "Breach."

Corporate liability for tort; national bank not liable for wrongful prosecution. *Hansford v. Nat. Bank of Tifton*, 270.

Dead body wrongfully disinterred; what recoverable. *McDonald v. Butler*, 845.

Deceit, action for. See *Fraud*.

Delay, damages for. See *Practice in Court of Appeals*; *Telegraph Company*.

Demand, as condition of liability. See *Municipal Corporation*; *Telegraph Company*; *Trover*.

DAMAGES—*continued.*

Demurrage, as element of, in suit against purchaser for failure to take goods. *Sims-McKenzie Co. v. Patterson*, 743-4.

Duty of injured party to lessen damage. *Salant v. Dannenberg Co.* 265; *Malloch v. Kicklighter*, 605.

Easement of burial in cemetery lot; value recoverable for wrongful deprivation of use. *McDonald v. Butler*, 845.

Extraordinary occurrence, as cause of damage; doctrine of *maxim res ipsa loquitur* applied. *Payne v. Coca-Cola Co.* 762.

Eye, damages for loss of, where telegram, requesting attendance of physician to check progress of disease, was unduly delayed. *W. U. Tel. Co. v. Ford*, 606.

Factor's sale of cotton before time instructed; what recoverable. *Wood v. Jones*, 735. Damages to set off. *Frost v. Powell*, 95.

Feelings, injury to, as basis of. *G. S. & F. Ry. Co. v. Ransom*, 558.

Fire, damage from. See *Railroad*.

Homicide of child, damages for. *Fuller v. Inman*, 680.

Homicide of employee of railroad company; damages under act of 1909, full value of life, without deduction for expenses. *Atkinson v. Hardaway*, 390.

Illness from exposure to rain. See catchword "Remoteness," *infra*.

Inference of negligence as cause of damage. See *Negligence*, catchword "Inference."

Insulting conduct, as basis for. *G. S. & F. Ry. Co. v. Ransom*, 558.

Insurance, refusal to pay; damages for bad faith in refusing, not authorized by evidence here. *Queen Ins. Co. v. Peters*, 289.

Interest; no reversible error in instruction to jury as to their discretion to include interest in aggregate amount of damages for killing stock by railroad train. *M., D. & S. R. Co. v. Hasty*, 104.

Interference by stranger with performance of contract of tenant, damages for. *Rawlings v. Sheppard*, 350.

Land, deterioration in value of. See catchwords "Value of land," *infra*.

Landowner's liability for injury from unguarded well. *Peterson v. Stalvey*, 649.

Lessen damage; injured party's duty to lessen. *Salant v. Dannenberg Co.* 265; *Malloch v. Kicklighter*, 605.

Life-expectancy table, mode of using; proper charge to jury on, in case of permanent injury. *Central Ry. Co. v. McGuire*, 485. Not essential part of evidence to enable jury to estimate damages for permanent injury. *So. Ry. Co. v. Parham*, 532, 540.

Malicious use of process. See that title.

Minor's death, when mother may recover for. *Fuller v. Inman*, 680.

Mortality tables. See catchwords "Life-expectancy," *supra*.

Nominal, facts making case for, where passenger was put off train at wrong place. *So. Ry. Co. v. Cartledge*, 523. Whether verdict for \$200 was sustainable as. *Id.* 526.

Notice of claim as condition of liability. See *Municipal Corporation; Railroad; Telegraph Company*.

Pain and suffering; no error in charging jury as to. *Central Ry. Co. v. McGuire*, 484(6).

DAMAGES—*continued.*

Pain, moaning and groaning in sleep admissible to show, when. *So. Ry. Co. v. Parham*, 541.

Passenger put off at wrong place; what recoverable. See *Railroad*.

Permanent bodily injuries; charge of court giving no rule for estimating damages, not cause reversal here. *So. Ry. Co. v. Parham*, 532, 540.

Possessor of realty entitled to recover for damage to it, without showing further title. *Flint River R. Co. v. Maples*, 575.

Proximate cause of injury. See *Negligence*.

Punitive; no aggravating circumstances authorizing, in case of passenger put off train at wrong place; error to charge jury as to. *So. Ry. Co. v. Cartledge*, 523, 526. Not authorized by conductor's language and manner here. *Id.* 524. See 526.

Recoupment, when allowed. *Wood v. Jones*, 736.

Remoteness; damages too remote, in case of passenger put off train at wrong place and made ill by rain beginning later. *So. Ry. Co. v. Cartledge*, 525. Expenses incurred by purchaser of saw-mill traction engine not delivered; demurrer not sustained as to. *Case Threshing Machine Co. v. Ezzell*, 647. See catchword "Contingency," supra, and title *Negligence*, catchwords "Proximate cause."

Resale, to prevent further loss, on failure to take goods bought. *Salant v. Dannenberg Co.* 265. Resale, as means of ascertaining damages on failure to take goods bought. *Sims-McKenzie Co. v. Patterson*, 742.

Sale by agent before time instructed; what recoverable. *Wood v. Jones*, 735.

Sale; damages on breach of contract of. See *Contract*, catchword "Breach."

Telegraph company, damages against. See *Telegraph Company*.

Set-off of damages. See *Pleading*.

Street, damages on account of defect in. See *Municipal Corporation*.

Trespasser, landowner not liable for injury to horse driven by, falling into unprotected well. *Peterson v. Stalvey*, 649.

Value of land, deterioration of; evidence as to poisoning of stock by drinking water impregnated with sewage, admitted, as tending to show. *City of Sandersville v. Stanley*, 361.

Value of life, as measure of, in suit against railroad company for homicide of employee; no deduction for expenses. *Atkinson v. Hardaway*, 390.

Vindictive; amount of verdict, not disturbed, unless such as to indicate bias or prejudice. *G. S. & F. Ry. Co. v. Ransom*, 558.

Worldly circumstances, error in charging as to. *So. Ry. Co. v. Cartledge*, 523.

DEAD BODY. See *Cemetery*.

DEATH. See *Criminal Law*; *Damages*; *Negligence*; *Railroad*, catchword "Homicide," *Trover*.

DEBTOR AND CREDITOR. See *Payment*.

Composition with debtor, consideration necessary. *Williams-Thompson Co. v. Williams*, 251-2. Estoppel of creditor to recede from. *Stovall Co. v. Shepherd Co.* 498.

Distribution of assets of insolvent bank; priority over general creditors, not awarded party who deposited check for collection. *Cronheim v. Postal Tel. Co.* 716, 723.

Election by creditor with lien on two funds, only one of which is available to other creditor, when required. *Moore v. Cofield*, 197; *Hodnett v. Mann*, 668. See *Baumgartner v. McKinnon*, 224.

Fraudulent transfer of property by debtor, to hinder creditors; transfer not subject to attack by subsequent creditors, when. *Jowers v. High Point Furniture Co.* 297. Vendor's retention of possession, not invalidate, as to pre-existing creditor, a sale otherwise bona fide. *Id.*

Sale of stock of goods in bulk; constitutionality of act of 1903; act construed strictly; not applied to settlement with all creditors, whereby the stock was turned over to a third person for sale, and the proceeds paid to the creditors. *Stovall Co. v. Shepherd Co.* 498.

DECEIT. See *Fraud*.DECLARATION. See *Action*; *Evidence*.DEED. See *Timber*.

Ambiguity in. See catchword "Description," *infra*.

Ancient, admissibility of, without proof of execution. *Smith v. Worley*, 283.

Attestation of lease of standing timber, governed by law as to deeds to land. *Cherry Lake Co. v. Lanier Armstrong Co.* 339. Attestation not by two witnesses, not affect validity of deed, as to persons with actual notice; it affects right of record and mode of proving execution. *Id.* See *Balchin v. Jones*, 434. Objection as to, not properly made. *Id.* And see title *Attestation*.

Authority of partner to make, for firm. *Cherry Lake Co. v. Lanier Armstrong Co.* 343.

Description not too indefinite, in lease of "all the timber suitable for turpentine purposes," growing on a lot designated by number, district, county, and State, though number of acres was not stated. *Id.* 339. Cases as to indefiniteness, distinguished. *Id.* 341. Not too indefinite in bill of household effects, office furniture, drugs, books, instruments, etc. *Balchin v. Jones*, 434. Sufficiency of description in bill of sale of staves. *Esteve v. Rosengrant*, 286. "One mouse-colored mare mule, five years old," sufficient. *First Nat. Bank v. Spicer*, 504.

Description; parol evidence in aid of. *Cherry Lake Co. v. Lanier Armstrong Co.* 339; *Balchin v. Jones*, 434.

Execution, proof of, when not necessary, as to recorded deed. *Smith v. Worley*, 281. See catchword "Attestation," *supra*.

Fraudulent conveyance by debtor, to hinder creditors; conveyance not subject to attack by subsequent creditors, when. *Jowers v. High Point Furniture Co.* 297. Vendor's retention of possession, when not invalidate, as to pre-existing creditor, a sale otherwise bona fide. *Id.*

DEED—*continued*.

Identification of property. See catchword "Description," *supra*.

Partner's authority to make, for firm. *Cherry Lake Co. v. Lanier Armstrong Co.* 343.

Record of (timber lease), where only one witness attested, unauthorized. *Nat. Produce Co. v. Cairo Melon Growers Asso.* 342.

Recording entitles deed to admission in evidence without proof of execution, if no affidavit of forgery has been filed, though recording be subsequent to commencement of suit. *Smith v. Worley*, 281.

Recording not necessary to give priority to deed of bargain and sale over subsequent judgment or attachment. *Id.*; *Balchin v. Jones*, 434.

DEFAMATION. See *Slander*.

DEFAULT. See *Judgment*.

DEFECTS. See *Master and Servant*; *Negligence*; *Sale*.

DEFENSE. See *Criminal Law*, catchwords, "Assault," "Homicide;" *Pleading*.

DEFINITIONS. See *Charge of Court*; *Words and Phrases*.

DEGREE OF CRIME. See *Criminal Law*.

DELAY. See *Practice in Court of Appeals*; *Telegraph Company*.

DELIVERY. See *Landlord and Tenant*; *Railroad*; *Sale*; *Statute of Frauds*.

DEMAND. See *Action*; *Contract*; *Criminal Law*; *Lien*; *Telegraph Company*; *Trover*.

DEMURRER. See *Pleading*; *Practice in Court of Appeals*.

DEPENDENCE. See *Criminal Law*, catchword "Child;" *Parent and Child*.

DEPOSITIONS. See *Evidence*.

DEPOT. See *Railroad*.

DESCRIPTION. See *Amendment*; *Criminal Law*, catchword "Indictment;" *Deed*; *Evidence*; *Mortgage*; *Trover*.

DETAINER FORCIBLE. See *Forcible Entry and Detainer*.

DILIGENCE. See *Negligence*.

DISCHARGE. See *Bankruptcy*; *Payment*; *Principal and Surety*.

DISORDERLY HOUSE. See *Criminal Law*.

DISPOSSESSION. See *Landlord and Tenant*, catchword "Eviction;" *Trespass*.

DISQUALIFICATION. See *Jury*; *Officer*.

DISTURBING SCHOOL. See *Criminal Law*.

DOMESTIC RELATIONS. See *Husband and Wife*; *Parent and Child*.

DOMICILE. See *Corporation*, catchword "Residence."

Intent necessary to change of. *Bush v. State*, 546. Statement of intention, admissible in evidence. *Flemister Grocery Co. v. Wright Mercantile Co.* 702.

Non-residence not result from mere casual or temporary absence from State on business or pleasure. *Id.*

Officer's change of, when to be judicially ascertained. *Bush v. State*, 546.

DRAFT. See *Check*.

DRIVER. See *Negligence*.

DRUNKENNESS. See *Criminal Law; Liquor*.

DYING DECLARATION. See *Criminal Law*.

EASEMENT. See *Cemetery*.

EDUCATION. See *Schools*.

EJECTMENT.

Possession, as basis of. *Taylor v. Keen*, 107.

ELECTION. See *Negligence; Pleading; Trover*.

Creditor with lien on two funds compelled to pursue the one not available to another lienholder. *Moore v. Cofield*, 197; *Hodnett v. Mann*, 668. See *Baumgartner v. McKinnon*, 224.

ELECTRICITY. See *Negligence*.

EMBEZZLEMENT. See *Criminal Law*.

EMPLOYER AND EMPLOYEE. See *Liquor*, catchword "Agency;" *Master and Servant; Principal and Agent*.

ENDORSEMENT. See *Check; Promissory Note*, catchword "Indorsement."

ENTRY FORCIBLE. See *Forcible Entry and Detainer*.

EQUITY. See *Garnishment*.

Distribution of fund among creditors, equitable principles applied in, where creditor held lien on two funds, only one of which was available to other lienholder. *Moore v. Cofield*, 197; *Hodnett v. Mann*, 668.

ERROR. See *Amendment; Appeal; Certiorari; Charge of Court; Evidence; New Trial; Practice in Court of Appeals; Verdict*.

ESCAPE. See *Criminal Law*.

ESTATE. See *Title; Trust*.

ESTOPPEL. See *Judgment*.

Authority of agent, facts not creating estoppel to deny. *McMichen v. Brown*, 506.

Bond, obligor securing advantage by, estopped from attacking it as invalid. *Alexander v. Morris*, 497.

Composition by creditors with debtor; estoppel of creditor to recede from. *Stovall Co. v. Shepherd Co.* 498.

Counter-claim, estoppel to set up, after giving note. *National Duck Mills v. Catlin*, 245-6.

Evidence, estoppel of party introducing; inaccurate charge to jury as to. *Holliday v. Athens*, 711, 715.

Promissory note, as estoppel. *National Duck Mills v. Catlin*, 245-6.

Ratification of unauthorized act; facts not creating estoppel. *McMichen v. Brown*, 506.

Receipt of premium on insurance policy, as estoppel. *Queen Ins. Co. v. Peters*, 292; *Volunteer Ins. Co. v. Buchanan*, 255.

Renewal note estopped maker from defenses or counter-claims known to him when he made it. *National Duck Mills v. Catlin*, 245.

Retention of insurance policy precluded defense to action for premium. *Franklin Life Ins. Co. v. Boykin*, 345.

Silence, as estoppel. *National Duck Mills v. Catlin*, 244.

EVICTIION. See *Landlord and Tenant*; *Trespass*.

EVIDENCE. See *Charge of Court*; *Witness*.

Administration, lack of, shown by witness testifying as to examination of records of ordinary's office. *Atkinson v. Hardaway*, 389.

Testimony that there had been no administration, assumed to have been based on due examination of records, when not objected to at trial. *Flint River R. Co. v. Maples*, 574.

Admission of general manager in letter to roadmaster, admissible against railroad company, here. *G. & F. Ry. v. Johnson*, 101.

Admission. See *Criminal Law*.

Agency not provable by declarations of agent. *Michigan Mutual Ins. Co. v. Parker*, 697. Not proved by letter-head and signing as agent. *Id.*

Alteration of note may be proved under plea of non est factum, if material. *Wilson v. Barnard*, 98.

Attestation, waiver of, by failure to object. *Balchin v. Jones*, 435. And see *Deed*.

Autoptic preference. *Morse v. State*, 61.

Burden of proof in suit against railroad company for injury to employee. *Central Ry. Co. v. McGuire*, 484. On party attacking administrator's returns, after their allowance. *Peavy v. Clemons*, 507. See *Charge of Court*; *Claim*; *Presumption*.

Certified copy from tax digest, admissible, to show what property was returned by taxpayer. *Baker v. Gaskins*, 679.

Character, knowledge of, when sufficient to qualify witness to testify as to. *Gordon v. State*, 35. Good character shown by long acquaintance with person, without having heard any one speak ill of him. *Id.* Admissibility of expressions used by woman, to show lewdness. *Fitzgerald v. State*, 71, 74. Character not shown by asking what kind of man the person is. *Peacock v. State*, 402. Character of accused; no error in charge to jury as to effect of evidence of good character. *Grusin v. State*, 153. See catchword "Reputation," *infra*.

Circumstantial. See *Charge of Court*; *Criminal Law*.

Color, difference in, as affecting question of intent to rape, where negro man assaults white woman. *McCullough v. State*, 403.

Comparison of handwriting, proof of signature by. *Wilson v. Barnard*, 99.

Competency of, not dependent on whether competent at time of filing suit. *Smith v. Worley*, 283. See *Witness*.

Conclusion of witness. Testimony that the described location of a fatal wound indicated the position of the deceased when shot, admitted; not material error. *Rivers v. State*, 487. Statement of one in possession of personal property, as to ownership, or that a certain person had never owned it, not inadmissible, as being conclusion. *Brooks v. Griffin*, 497.

Confession. See *Criminal Law*.

Confidential communication, letter of general manager of railroad to roadmaster was not. *Ga. & Fla. Ry. v. Johnson*, 101.

EVIDENCE—continued.

- Copy of letter should be identified as such, before it is admitted as secondary evidence. *Frost v. Powell*, 96. Copy admitted, to show difference between original paper and paper as altered, when. *Wilson v. Barnard*, 99. Copy of mortgage, admissibility of. *James v. Pepper*, 266. See catchwords "Taxpayer's return," *infra*.
- Corpus delicti, proof of. See *Criminal Law*.
- Credibility; comparative means of knowledge, as test, in weighing testimony of different persons; error in charge to jury. *Lawrence v. State*, 787.
- Crime other than that for which accused is on trial, admissibility of testimony as to. *Martin v. State*, 795.
- Crimination of self under compulsion; objection not sustained as to arresting officer's testimony that at his direction the defendant unlocked a door and thus disclosed evidence against himself. *Herndon v. State*, 119. See *Criminal Law*, catchword "Confession."
- Custom at variance with contract, error in admitting testimony as to. *Patapsco Shoe Co. v. Bankston*, 676, 678.
- Custom of architects not to guarantee exact cost of building, but only to make approximate estimate; testimony admissible as to. *Douglas v. Rogers*, 486.
- Death, cause of. See *Criminal Law*, catchword "Homicide."
- Declaration self-serving, as to declarant's illness, rejected. *Peacock v. State*, 402. In letters between party offering them and his agent, inadmissible. *McNamara v. Georgia Cotton Co.* 669. Declarations of agent, not admissible to show agency. *Michigan Mutual Ins. Co. v. Parker*, 697. Declarations of pain, when admissible. *So. Ry. Co. v. Parham*, 532, 541. Admissibility of declarations as part of *res gestæ*. See catchwords "Res gestæ," *infra*. Dying declarations. See *Criminal Law*.
- Declarations. See catchwords "Res gestæ," *infra*.
- Deed, admissibility of. See *Deed*.
- Depositions read though witness present; no error. *Seaboard Ry. v. Hunt*, 273. Depositions taken without due notice to opposite party, error in admitting. *Hammond v. Jacques*, 286.
- Description in deed, admissibility of parol testimony in aid of. *Esteve v. Rosengrant*, 286; *Cherry Lake Co. v. Lanier Armstrong Co.* 339; *Balchin v. Jones*, 434.
- Descriptive words on package, as evidence of contents. *Cassidy v. State*, 123.
- Documentary. See catchwords, "Copy," *supra*; "Execution," "Letters," "Non est factum," *infra*.
- Dying declarations. See *Criminal Law*.
- Error harmless, in admitting hearsay and irrelevant testimony, here. *Garnett v. State*, 114. Error in admitting, cured by other proof. *Fletcher v. Young*, 184. Error in refusing to allow witness to testify, no ground for reversal, unless injury shown; the expected testimony should be set forth. *Dennis v. State*, 219. Error harmless, in admitting letters without sufficient

EVIDENCE—*continued.*

- proof of execution. *Nat. Produce Co. v. Cairo Melon Growers Asso.* 338. In admitting affidavit to account, there being sufficient other proof. *Lackey v. Old Kentucky Mfg. Co.* 382. In admitting hearsay, here. *Hubbard v. Shaw*, 488.
- Escape not attempted, not relevant. *Register v. State*, 623.
- Estoppel to attack testimony of own witness; inaccurate charge to jury as to. *Holliday v. Athens*, 711, 715.
- Exclamations of pain, when admissible. *So. Ry. Co. v. Parham*, 532, 541.
- Execution of writing; error in not requiring proof of, immaterial, when. *Ga., Fla. & Ala. Ry. Co. v. Fla. & Ga. Tobacco Co.* 38. Proof of, when not necessary as to deed. *Smith v. Worley*, 281. Proved by testimony of party who executed paper, without producing subscribing witness. *Christie v. Shingler*, 529. See catchwords "Non est factum," "Signature," *infra*, and *Deed*, catchword "Attestation."
- Expert, not required, as to cause of death. *Brown v. State*, 216. How impeached; physician not impeachable by showing that in other cases he made mistakes in diagnosis. *So. Ry. Co. v. Parham*, 531. As to reasonable probability of saving eye affected with corneal ulcer, based on experience and statistics, competent. *W. U. Tel. Co. v. Ford*, 606, 620. See catchword "Opinion." *infra*.
- Flight, accused not allowed to prove he did not attempt. *Register v. State*, 623.
- Forgery of title, when shown without plea of non est factum. *Citizens Bank v. Peebles*, 703.
- Fraud inducing written contract renders inapplicable the rule that parol testimony shall not be received to vary such a contract. *Mizell Live Stock Co. v. Banks*, 362; *Chandler-Blackstad Co. v. Price*, 383.
- Handwriting, proof of, by comparison with other writing. *Wilson v. Barnard*, 99.
- Hearsay rule excludes extrajudicial utterances only when offered to evidence the truth of the matter asserted. *Fitzgerald v. State*, 71. Not applied to words constituting conduct. *Id.* 71, 75. Harmless error in admitting hearsay. *Garnett v. State*, 114; *Hubbard v. Shaw*, 488. Testimony on trial of one charged with selling liquor, that a man to whom the witness had given money to buy whisky returned with whisky, not excluded as hearsay. *Grusin v. State*, 152. Hearsay without probative value. *A. C. L. R. Co. v. Gordon*, 314; *Michigan Mutual Ins. Co. v. Parker*, 697. Self-serving declaration as to illness, excluded as. *Peacock v. State*, 402. Testimony not affirmatively appearing to be hearsay, not excluded as such, where it might rest on personal knowledge. *Flint River R. Co. v. Maples*, 574. Physician's testimony, based on statistics and consensus of opinion of specialists, not excluded as. *W. U. Tel. Co. v. Ford*, 606, 620.
- Husband not competent to testify on trial of his wife; no exception as to trial for crime on his person. *Ector v. State*, 777.

EVIDENCE—continued.

Identification by prisoner's statement to jury, not render thing admissible as evidence. *Register v. State*, 623.

Identification; error in excluding proof of inquiries made by companion of witness testifying to identity, tending to show inability to identify. *Hays v. State*, 823.

Identification of property described in deed or mortgage. *First National Bank v. Fitzgerald*, 503-4. See catchword "Description," *supra*.

Illegal testimony, tender of, not cause for mistrial, when. *Herring v. State*, 88.

Impeached witness may be believed without corroboration. *Brown v. State*, 50. Impeaching testimony, no ground for setting aside conviction. *Gordon v. State*, 36; *Holloway v. State*, 49.

Impeachment by contradictory testimony of the same witness in brief of evidence on former trial. *Cox v. McKinley*, 492.

Impeachment; no error in charging jury that they may accept explanation of witness as to why he made contradictory statements, though not sustained by other facts. *Solomon v. State*, 469.

Impeachment of medical expert, proper mode of, by testimony as to general reputation, not as to failure or wrong diagnosis in particular cases. *So. Ry. Co. v. Parham*, 531.

Impeachment; sustaining witness by proof of good character; evidence sufficient to authorize instruction as to this. *Gordon v. State*, 35.

Impeachment; uncontradicted part of testimony may be disregarded, where the same witness has been contradicted as to other parts. *M., D. & S. R. Co. v. Barfield*, 105.

Inference of negligence, in case of explosion of bottle; doctrine of maxim *res ipsa loquitur* discussed. *Payne v. Rome Coca-Cola Bottling Co.* 762.

Inspection and tasting by jurors. *Morse v. State*, 61, 64.

Intestacy presumed until proof of will. *Atkinson v. Hardaway*, 389.

Intimidation of witness, as reason for his leaving home; no error in allowing him to testify to. *Solomon v. State*, 469.

Irrelevant, objection that evidence is, does not raise question as to genuineness of signature. *Hickman v. Bell*, 320.

Irrelevant, prejudicial here. *First Nat. Bank v. Spicer*, 505.

Judgment, admissibility and effect of. See *Judgment*.

Judicial cognizance that "greenback" is popular designation of a species of U. S. currency. *Jones v. State*, 59. Of bankruptcy proceedings, not taken by State court. *McDougald v. Chattanooga Medicine Co.* 653. Not taken of schedule of rates filed by carrier with interstate-commerce commission. *Hartwell Ry. Co. v. Kidd*, 771. Taken of computation of time, and of what dates are Sundays. *Williams v. Allison*, 840.

Knowledge; reputation and other circumstances tending to show. *Fitzgerald v. State*, 71, 72.

Label, as evidence of contents of package. *Cassidy v. State*, 123.

EVIDENCE—continued.

- Leading question, allowance of, discretionary with judge. *Grusin v. State*, 162.
- Letter, admissibility of copy of. *Frost v. Powell*, 96. Sufficiency of evidence as to genuineness. *Nat. Produce Co. v. Cairo Melon Growers Asso.* 338. Presumption as to receipt of, where properly addressed and duly mailed; rebutted by uncontradicted evidence. *Cassel v. Randall*, 587. Letters between party offering them and his agent, held inadmissible, because self-serving declarations. *McNamara v. Georgia Cotton Co.* 669. Letter with "general agent" after signer's name, and with name of company in printed heading, not admissible against company, when. *Michigan Mutual Ins. Co. v. Parker*, 697.
- License (U. S.) for sale of liquor, evidence as to violation of State liquor law. *Cassidy v. State*, 123; *Jackson v. State*, 143.
- Lost mortgage, admissibility of secondary proof as to. *James v. Pepper*, 266.
- Mailed letter, presumption as to receipt of. *Cassel v. Randall*, 587.
- Market value. See catchword "Value," infra.
- Married persons. See catchword "Husband," supra.
- Mistrial on account of tender of illegal testimony, when not declared. *Herring v. State*, 89.
- Mortgage; parol evidence not admitted to extend mortgage to debt not specified in it. *Kight v. Robinson*, 548.
- Motive, evidence insufficient as to, in arson case. *Matthews v. State*, 302.
- Negative and without probative value. *Arnold v. Virginia-Carolina Chemical Co.* 12.
- Non est factum; proof of forgery without plea of. *Citizens Bank v. Peeples*, 703. See *Pleading*.
- Notice; circumstances sufficient to put prudent man on inquiry. See *Promissory Note*.
- Objection not repeated after judge's statement that he would "leave the testimony in for the present," limiting it to a special purpose; no ground for exception. *Bowers v. So. Ry. Co.* 368, 374.
- Opinion as to value. See catchword "Value," infra.
- Opinion of physician, that death would soon follow wound, admissibility of. *Langston v. State*, 84. See catchword "Expert," supra.
- Pain, moaning and groaning in sleep admissible to show, when. *So. Ry. Co. v. Parham*, 541.
- Parol. To aid description of property in deed or bill of sale, when admissible. *Esteve v. Rosengrant*, 286; *Cherry Lake Co. v. Lanier Armstrong Co.* 339; *Balchin v. Jones*, 434. To show consideration of note, admissible. *Nunes Gin & Warehouse Co. v. Moore*, 350. As to consideration of note and deed, allowed. *Wood v. Jones*, 737. To show consideration of written contract was illegal or immoral, admissible. *McNamara v. Georgia Cotton Co.* 669. To change or add to written contract, not admissible. *Campbell v. Alkahest Lyceum System*, 839. Rule not applied to contract procured by fraud. *Mizell Live Stock Co. v. Banks*, 362; *Chandler-Blackstad Co. v. Price*, 383. Parol admissible to show contract was procured by fraudulent misrepre-

EVIDENCE—continued.

- sentations. *Loyless v. Hesse Envelope Co.* 660. Admitted to support defense to note, by showing unsoundness of mule, as to which the note contained a stipulation limiting the seller's warranty. *Edensfield v. Coleman*, 355. To show meaning of "during the turpentine season," in contract for service. *Peacock v. State*, 408. Not admissible to extend mortgage to a debt not specified in it. *Kight v. Robinson*, 548. See, also, as to parol agreements, *Statute of Frauds*.
- Physician. See catchwords, "Expert," "Opinion," supra.
- Plea not sustained by, excluded from consideration of jury. *Hickman v. Bell*, 319.
- Possession of animal, sufficiency of evidence as to. *Patrick v. Henderson*, 285.
- Questions leading, allowance of, discretionary. *Grusin v. State*, 152.
- Reopening case for introduction of, discretionary. *Id.* 152-3.
- Reputation, testimony as to, not excluded on account of answers on cross-examination here. *Fitzgerald v. State*, 70. See catchword "Character," supra.
- Res gestæ. Statement by slayer, after walking from place of killing to opposite side of street, that he "had to do it," not admitted as. *Carswell v. State*, 30. Statements of assailant and a bystander, just as assault was made, admissible as. *Smith v. State*, 37. Exclamations manifesting existence of pain are, when. *So. Ry. Co. v. Parham*, 532.
- Res ipsa loquitur; doctrine discussed and applied. *Payne v. Rome Coca-Cola Co.* 762.
- Search of person, admissibility of evidence obtained by. *Byrd v. State*, 214.
- Secondary; admission of, generally not ground for reversal, where the fact to which it relates is shown by other evidence. *Fletcher v. Young*, 184. Of lost mortgage purporting to have been executed in another State, admissibility of. *James v. Pepper*, 266. See catchword "Copy," supra.
- Self crimination. See catchwords "Crimination of self," supra.
- Sickness; declaration of person that he was sick, rejected as hearsay. *Peacock v. State*, 402.
- Signature, proof of, by comparison with admittedly genuine signature. *Wilson v. Barnard*, 99. Sufficiency of proof as to genuineness. *Nat. Produce Co. v. Cairo Melon Growers Asso.* 338.
- Sleeper's moans, as evidence of pain. *So. Ry. Co. v. Parham*, 532, 541.
- Speculative intent in contract; admissibility of testimony as to. *Volunteer Ins. Co. v. Buchanan*, 255. See *Sale*, catchword "Futures."
- Statistics, admissibility of testimony based on. *W. U. Tel. Co. v. Ford*, 620.
- Taxpayer's return, shown by certified copy from tax digest. *Baker v. Gaskins*, 679.
- Title forged, when shown without plea of non est factum. *Citizens Bank v. Peeples*, 703.

EVIDENCE—*continued*.

Title to personal property, statement as to, when not objectionable as conclusion of witness. *Brooks v. Griffin*, 497.

Value. Fact that goods had value, shown by fact that they had been sold, though price or quantity not proved. *Tolver v. State*, 33. Value not proved, no reason for granting new trial, in absence of assignment of error as to lack of evidence. *Ga., Fla. & Ala. Ry. Co. v. Fla. & Ga. Tobacco Co.* 38. Proof of market value at one place, as tending to show market value at another place. *Frost v. Powell*, 96. Rule that jury is not bound by opinion of witness as to, not applied where one testified to knowledge of market value at a given time and place. *McNamara v. Georgia Cotton Co.* 669. Sufficient proof of value. *Downer v. State*, 827. Evidence as to poisoning of stock by water impregnated with sewage, admitted, as tending to show deterioration of value of land. *City of Sandersville v. Stanley*, 361. Value of promissory note, prima facie its amount, when. *Birmingham Fertilizer Co. v. Cox*, 699. Value stated in affidavit for bail, in trover, sufficient basis for amount of judgment against plaintiff. *Kaufman v. S. A. L. Ry.* 250.

Venue, sufficient proof of. *M., D. & S. R. Co. v. Barfield*, 104. See *Criminal Law*.

Verbal acts, not within hearsay rule. *Fitzgerald v. State*, 75.

Weight of. See catchword "Credibility," *supra*.

Wife's incompetency to testify on trial of husband, and husband's incompetency in wife's case; history of legislation; exception to rule, where offense is against wife's person; no exception in favor of husband. *Ector v. State*, 777.

Words constituting conduct, not excluded under hearsay rule, when. *Fitzgerald v. State*, 71, 75.

Writing. See catchwords, "Copy," "Execution," "Letter," "Non est factum," "Parol," "Secondary," "Signature," *supra*.

EXCEPTIONS. See *Certiorari*; *New Trial*; *Practice in Court of Appeals*.

EXCITEMENT. See *Negligence*.

EXECUTION. See *Illegality, Affidavit of*; *Levy and Sale*.

Contribution; law as to control of fl. fa. by codefendant paying, applies to execution against partners, when. *Higdon v. Williamson*, 376.

EXECUTION OF WRITING. See *Deed*; *Evidence*.

EXECUTOR. See *Administrator*.

EXEMPTION. See *Garnishment*; *Homestead*.

EXPERT. See *Evidence*.

EXPLOSION. See *Negligence*.

EXPRESS COMPANY. See *Railroad*, as to carriers generally.

Fraud on, by non-disclosure of value, not shown by evidence here. *Fine v. So. Exp. Co.* 165.

"Jewelry;" term not held applicable to contents of express package here. *Id.* 165-7.

Value, non-disclosure of, by shipper. *Id.*

EYE. See *Damages*.

FACTOR. See *Principal and Agent*.

FALSE REPRESENTATIONS. See *Criminal Law*, catchword "Cheating;" *Fraud*.

FEAR. See *Criminal Law*.

FEES. See *Attorney at Law*.

FELLOW SERVANT. See *Master and Servant*.

FENCE. See *Criminal Law*, catchwords "Malicious killing of hog."

FERTILIZER.

Tagging and branding, compliance with law as to, shown by positive evidence; evidence to contrary negative and without probative value; no error in directing verdict for seller. *Arnold v. Virginia-Carolina Chemical Co.* 12.

FILING. See *Appeal; Practice in Court of Appeals; Words and Phrases*.

FIRE. See *Railroad*.

FIRE INSURANCE. See *Insurance*.

FIREARMS. See *Criminal Law*.

FITZGERALD. See *City Court*.

FLIGHT. See *Criminal Law*.

FORCIBLE ENTRY AND DETAINER.

Both forcible entry and forcible detainer must be proved, to authorize general verdict on charge of. *Cate v. Knight*, 664.

Force not shown in acts and language of one building house on boundary line here. *Id.*

FORECLOSURE. See *Lien; Mortgage*.

FORFEITURE. See *Bond; Insurance*.

FORGERY. See *Check; Evidence*.

FORMER JEOPARDY. See *Criminal Law*.

FORNICATION. See *Criminal Law*.

FRATERNAL ORDER. See *Insurance*.

FRAUD. See *Husband and Wife*.

Cheating and swindling. See *Criminal Law*.

Conveyance to hinder creditors; conveyance not subject to attack by subsequent creditors, when. *Jowers v. High Point Furniture Co.* 297. Vendor's retention of possession, not invalidate, as to pre-existing creditor, a sale otherwise bona fide. *Id.*

Deceit, action for, on account of representation to obtain credit for another, not maintainable, unless the representation was in writing and signed. *Smith v. Jewett*, 294.

Disclosure not made by shipper to carrier, as to value of article shipped; no fraud, here. *Fine v. So. Express Co.* 165.

Evidence; rule that parol testimony shall not be received to vary written contract, not apply to contract procured by fraud. *Mizell Live Stock Co. v. Banks*, 362; *Chander-Blackstad Co. v. Price*, 383.

False representation. See catchword "Misrepresentation," *infra*.

FRAUD—*continued*.

- Garnishment of fraudulent transferee. *Stovall Co. v. Shepherd Co.* 500.
- Horse trade, fraud in, as defense to note. *Mizell Live Stock Co. v. Banks*, 362. Transaction not authorizing conviction of cheating and swindling. *Odum v. State*, 27.
- Misrepresentation as to age of horse; good plea. *Mizell Live Stock Co. v. Banks*, 362.
- Misrepresentation causing party to sign contract without reading. *Chandler-Blackstad Co. v. Price*, 383; *Patapsco Shoe Co. v. Bankston*, 675.
- Misrepresentation fraudulent, inducing written contract; admissibility of parol proof as to. *Loyless v. Hesse Envelope Co.* 660.
- Misrepresentation not shown to have deceived, in sale of horse with patent defect, not authorize conviction of cheating and swindling. *Odum v. State*, 27.
- Misrepresentation; whether purchaser was entitled to rely on representation of seller, after contrary statement of a third person. *Mizell Live Stock Co. v. Banks*, 365.
- Negligence of party deceived, as affecting right to complain of. *Patapsco Shoe Co. v. Bankston*, 671.
- Opportunity to discover facts, want of, by reason of haste of other party to catch train. *Id.* 675.
- Possession retained by vendor, when no fraud against creditors. *Jowers v. High Point Furniture Co.* 297.
- Rescission for, in sale of horse. *Mizell Live Stock Co. v. Banks*, 362.
- Trover for property obtained by. *Story v. Williams*, 392.

FRAUDS, STATUTE OF. See *Statute of Frauds*.

FUTURES. See *Sale*.

GAME. See *Criminal Law*.

GAMING. See *Criminal Law*; *Sale*, catchword "Futures."

GARNISHMENT.

- Administrator, garnishment of, without allegation of non-residence or insolvency of defendant; amendment allowable, when. *Stovall v. Joiner*, 204.
- Affidavit for, when amendable. *Id.*
- Amendment of proceedings. *Id.*
- Collateral security, garnishment against holder of, ineffectual to reach surplus, when. *Smith v. Worley*, 280.
- Equitable pleading necessary to aid, in reaching surplus of collateral. *Id.*
- Exemption of laborer's wages includes monthly wages of person employed to check cotton as weighed and classified, and who also works as stenographer, typewriter, and letter filer. *Langley Mfg. Co. v. Frey*, 753.
- Foreclosure of laborer's lien, no basis for garnishment, when. *Weston v. Beverly*, 261.
- Fraudulent transferee, garnishment of. *Stovall Co. v. Shepherd Co.* 500.

GARNISHMENT—*continued.*

Goods sold in bulk without complying with act of 1903; garnishment of purchaser. *Id.*

Judgment as basis of, must be in personam, not in rem. *Weston v. Beverly*, 261.

Laborer, meaning of. *Langley Mfg. Co. v. Frey*, 753. And see *Lien*.

Remedy by, statutory, and not extended to cases not provided for. *Weston v. Beverly*, 261.

"Suit," as basis of, defined; not include proceeding in rem. *Id.*

GENERAL MANAGER. See *Principal and Agent*.

GOOD FAITH. See *Criminal Law; Fraud; Husband and Wife*.

GRADE OF CRIME. See *Criminal Law*.

GROUND. See *New Trial*.

GUARANTY. See *Sale*, catchword "Warranty."

GUARDIAN AD LITEM. See *Parties*, catchword "Minor."

HABIT. See *Evidence*, catchword "Custom;" *Master and Servant*.

HANDWRITING. See *Evidence*.

HEARSAY. See *Evidence*.

HEIRS. See *Action; Administrator and Executor*.

HIGHWAY. See *Negligence; Road*.

HOLIDAY. See *Contract*, catchword "Sunday;" *Telegraph Company*.

HOMESTEAD AND EXEMPTION.

Both exemptions not allowed. *McFarlin v. Reeves*, 581.

HOMICIDE. See *Criminal Law; Damages; Negligence; Railroad*.

HORSE. See *Sale*.

HOTEL KEEPER. See *Criminal Law*, catchwords "Lewd house."

HOUSE OF ILL-FAME. See *Criminal Law*, catchwords "Lewd house."

HUNTING. See *Criminal Law*.

HUSBAND AND WIFE.

Bona fides of transaction between, question for jury. *Brooks v. Griffin*, 497.

Evidence of husband not admissible against wife on her trial for crime; crime against his person not excepted. *Ector v. State*, 777.

Fraud in transaction between, to defeat creditor of husband; sufficiency of circumstances to show. *Brooks v. Griffin*, 497.

Support of children, father not relieved of, by contract of separation and provisions as to custody, here; liable to mother for amount paid by her for medicine, etc., for them. *McCarter v. McCarter*, 754.

Suretyship of married woman, collusive scheme to evade statute as to. *Summers v. Lee*, 441.

IDENTIFICATION. See *Deed; Evidence*.

ILLEGALITY, AFFIDAVIT OF.

Dismissal of, affirmed, in view of recitals in bill of exceptions, etc., contradicting. *Allen v. Windham*, 169.

Judgment not subject to attack by, for purpose of setting up suretyship of defendant duly served, who had day in court. *Cunnard v. Childs*, 175.

- ILLEGALITY OF CONTRACT. See *Contract*.
- IMPEACHMENT. See *Charge of Court*; *Evidence*.
- IMPRISONMENT. See *Criminal Law*, catchwords "Escape," "Punishment."
- IMPROVEMENTS. See *Landlord and Tenant*.
- INDEFINITENESS. See *Contract*, catchword "Certainty;" *Pleading*; *Verdict*.
- INDEMNITY. See *Bond*; *Principal and Surety*.
- INDICTMENT. See *Criminal Law*.
- INDORSEMENT. See *Cheek*; *Promissory Note*.
- INFANT. See *Criminal Law*, catchwords "Child," "Minor;" *Liquor*; *Parent and Child*; *Parties*; *Service*, catchword "Minor."
- INFERENCE. See *Negligence*; *Presumption*.
- INITIATION. See *Insurance*.
- INJURY. See *Damages*; *Master and Servant*; *Negligence*; *Railroad*.
- INNKEEPER. See *Criminal Law*, catchwords "Lewd house."
- INSOLVENCY. See *Bank*; *Bankruptcy*; *Debtor and Creditor*.
- INSPECTION. See *Evidence*.
- INSTRUCTIONS. See *Charge of Court*; *Judge*; *Master and Servant*; *Principal and Agent*.
- INSURANCE.

Administrator, proper personal representative to sue on policy issued in name of intestate. *Queen Ins. Co. v. Peters*, 289, 293.

Agency not proved by letter-head and signing as agent. *Michigan Mutual Ins. Co. v. Parker*, 697.

Agent's authority to release from liability on note for premium, not shown. *Id.*

Assignment of life-insurance may be made by insured to one who has no insurable interest in his life, if not cover for wager policy; intent a jury question. *Volunteer Ins. Co. v. Buchanan*, 255. Admissibility of testimony as to intent. *Id.* Proof of interest of assignee, compliance with provision as to. *Id.*

Attorney's fees claimed, whether damages or costs, in suit against insurance company. *Queen Ins. Co. v. Peters*, 290, 291. Evidence not authorizing recovery of. *Id.* 294.

Bad faith in not paying, not shown. *Queen Ins. Co. v. Peters*, 289.

Benefit order. See catchword "Fraternal," *infra*.

Contracts of insurance, courts will draw every reasonable deduction to uphold. *Queen Ins. Co. v. Peters*, 289.

Custom, as affecting payment of premiums. *Wallace v. Metropolitan L. Ins. Co.* 517.

Damages for bad faith in not paying; not authorized by evidence here. *Queen Ins. Co. v. Peters*, 289.

Dead man named as insured, in fire-insurance policy; contract valid, when. *Id.*

INSURANCE—continued.

Estoppel by receipt of premiums, to contest validity of policy. *Id.*; *Volunteer Ins. Co. v. Buchannan*, 255.

Estoppel to defeat action for premium while retaining policy. *Franklin Life Ins. Co. v. Boykin*, 345.

Forfeiture for non-payment of premium. See catchword "Premium," *infra*.

"Fraternal benefit order" defined. *Brown v. Bowman*, 708. Admission that plaintiff was such an order meant that it had a representative form of government and lodge system as described in the code. *Id.* Query, whether policy-holder, sued on premium note, could set up the contrary. *Id.* He could not set up that he had not been initiated. *Id.* Effect of failure to initiate. *Id.* 709. Non-payment of dues, as ground for forfeiture. *District Grand Lodge v. Shelton*, 527.

Initiation, effect of non-compliance with requirement as to, in fraternal beneficiary order. *Brown v. Bowman*, 708-9.

"Insured," meaning of, in policy. *Queen Ins. Co. v. Peters*, 289.

Interest of assignee. See catchword "Assignment," *supra*.

"Legal representative" of insured, meaning of. *Queen Ins. Co. v. Peters*, 293.

Lodge. See catchword "Fraternal," *supra*.

Non-payment of premium. See catchword "Premium," *below*.

Policy returned, acceptance not proved. *Michigan Mutual Ins. Co. v. Parker*, 697.

Premium, estoppel by receipt of, to contest validity. *Volunteer Ins. Co. v. Buchannan*, 255; *Queen Ins. Co. v. Peters*, 292. Tender to return premium, as prerequisite to contesting validity of policy. *Volunteer Ins. Co. v. Buchannan*, 255. Action for, could not be defeated by insured while retaining policy. *Franklin Life Ins. Co. v. Boykin*, 345. Custom of sending agent to collect may be discontinued, on notice, where policy makes it payable at home office of insurer. *Wallace v. Metropolitan L. Ins. Co.* 517. Custom of accepting in 30 days after maturity, not require acceptance after that period. *Id.* Waiver of forfeiture for non-payment, not shown by facts here. *Id.* Dissent, 521. Agent's authority to release from liability on note for, not shown. *Michigan Mutual Ins. Co. v. Parker*, 697. Premium note; insufficient defenses, as to society's non-compliance with law relating to organization, initiation of members, etc. *Brown v. Bowman*, 707.

"Representative" of insured. *Queen Ins. Co. v. Peters*, 293.

Right to do insurance business, how questioned. *Brown v. Bowman*, 708.

Speculative intent in contract; admissibility of testimony as to. *Volunteer Ins. Co. v. Buchannan*, 255.

Wager policy. See catchword "Assignment," *supra*.

Waiver; duty of courts to be prompt to seize any circumstance indicating waiver of forfeiture. *Wallace v. Metropolitan L. Ins. Co.* 522. See catchwords "Estoppel," "Premium," *supra*.

INTEREST.

Account, judgment for interest on. See catchword "Judgment," *infra*.
Damages; no reversible error in instruction to jury as to their discretion to include interest in aggregate amount of damages for killing stock by railroad train. *M., D. & S. R. Co. v. Hasty*, 104.

Default as to, as notice of defenses to purchaser of note before maturity of principal. *Park v. Buxton*, 356.

Judgment for, from date when account became due, properly entered on verdict for principal "and interest." *Thomas v. Monticello Vehicle Co.* 260.

INTERFERENCE OF STRANGER WITH TENANT. See *Landlord and Tenant*.

INTERSTATE COMMERCE. See *Liquor; Railroad*.

INTOXICATION. See *Criminal Law; Liquor*.

INTRUDER. See *Forcible Entry and Detainer; Trespass*.

INVOLUNTARY MANSLAUGHTER. See *Criminal Law*.

JEOPARDY. See *Criminal Law*.

JEWELRY. See *Words and Phrases*.

JOINDER. See *Action; Criminal Law*.

JUDGE. See *Charge of Court; Trial*.

Absence of, during part of trial, effect of. *Brantley v. State*, 24; *Martin v. State*, 455.

Correction of record, power as to. *Atkinson v. Hardaway*, 389.

Power as to direction to jury, in regard to verdict in criminal case. *Register v. State*, 623. Dissenting opinion, 636.

Question to counsel in hearing of jury, as to whether counsel will consent to their separation, bad practice. *Carter v. State*, 851.

Questions and remarks to jury. See *Jury*, catchword "Judge."

Remarks of, in presence of jury. See *Trial*.

JUDGMENT.

Abatement, judgment on plea of; when no bar to another suit. *Beckwith v. Mansfield Lumber Co.* 346.

Administrator's returns, effect of allowance of. *Peavy v. Clemons*, 507.

Agreement to abide by judgment in other case, construed. *Livingston v. Martin*, 766.

Bankruptcy, discharge in, not pleaded, not avoid judgment. *McDougald v. Chattanooga Medicine Co.* 653.

Conclusiveness of former decision of Court of Appeals, in the same case. *Hunnicut v. Graves*, 12. Conclusiveness as to questions that might have been made. *Puffer Mfg. Co. v. Rivers*, 154, 156. Judgment on one note of series, how far conclusive as to matters pleaded in suit on other notes of the series. *Id.* Judgment for defendant on plea in abatement not affecting merits of case, no bar to subsequent suit on same cause of action.

JUDGMENT—*continued*.

- Beckwith v. Mansfield Lumber Co.* 346. Of judgment against partnership. *Higdon v. Williamson*, 376. Ordinary's allowance of administrator's returns, not conclusive, but prima facie evidence of correctness. *Peavy v. Clemons*, 507. See catchword "Demurrer," *infra*.
- Default, when not opened in city court. *Tenn. Oil Co. v. American Art Works*, 45. Refusal to open, error here. *Slack v. Elkins*, 571.
- Demurrer, judgment on, not excepted to, is law of the case. *Murphey v. Creamer*, 593.
- Estoppel by. See catchword "Conclusiveness," *supra*.
- Judicial cognizance of judgment of bankrupt court, not taken by State court. *McDougald v. Chattanooga Medicine Co.* 653.
- Lien of, not attach to property conveyed by antecedent unrecorded deed of bargain and sale. *Smith v. Worley*, 281; *Balchin v. Jones*, 434.
- Motion to set aside, properly overruled, where defense relied on was in proposed amendment to answer not containing enough to amend by. *Moss v. Anderson*, 784.
- Ordinary's allowance of administrator's returns, effect of. *Peavy v. Clemons*, 507.
- Partnership, effect of judgment against. *Higdon v. Williamson*, 376. Judgment against firm alone, not enforceable against individual assets of member. *Flowers v. Strickland*, 739.
- Res judicata. See catchword "Conclusiveness," *supra*.
- Sentence. See *Criminal Law*.
- United States court judgment remanding case to State court, effect of. *Queen Ins. Co. v. Peters*, 289, 291.
- Void judgment of justice's court can not be set aside by that court, but may be disregarded by the justice or any other court. *McDougald v. Chattanooga Medicine Co.* 655.

JUDICIAL COGNIZANCE. See *Evidence*.JURISDICTION. See *Amendment*; *Domicile*; *Justice's Court*; *Trusts*.

- Action construed so as to uphold jurisdiction, in case of doubt. *Fine v. So. Express Co.* 161.
- Boundary between Georgia and South Carolina, defined. *James v. State*, 13. Rule in case of change of course of river. *Id.* 15.
- Certiorari can not be used to question legal existence of court to which the writ is directed. *Morton v. Rome*, 604.
- Doubt as to nature of action, resolved in favor of jurisdiction. *Fine v. So. Express Co.* 161.
- Question as to, not made in trial court, not considered by reviewing court. *Coker v. Tifton*, 66.
- Term for trial, waiver as to, in criminal case in city court. *Haygood v. State*, 394.
- Venue. See *Criminal Law*; *Railroad*; *Trover*.
- Waiver of, not result from giving forthcoming bond. *Hall v. Roehr*, 380. Waiver of, by demand for trial, followed by trial. *Haygood v. State*, 394.

JURY AND JURORS. See *Charge of Court*; *Verdict*.

Absence of judge from county while jury were deliberating, vitiated the trial and rendered the verdict a nullity. *Martin v. State*, 455.
Temporary absence from court-room, not cause for new trial, here. *Brantley v. State*, 24.

Affidavit of juror, impeaching verdict, not considered. *Redfearn v. Thompson*, 551.

Agreement by arbitrary compromise, or "splitting the difference." *Peavy v. Clemons*, 507, 513.

Agreement, judge's remarks to jury as to. See catchword "Judge," *infra*.

Challenge, decision on, when reviewable, and when not. *Redfearn v. Thompson*, 551, 556.

Disqualification. By relationship to prosecutor. *Harris v. State*, 70.
No ground for new trial, if known to accused or his counsel at trial. *Id.* Insufficient showing as to fact of relationship. *Id.*
Of grand juror, no ground for plea in abatement. *Garnett v. State*, 109, 112. Disqualification by bias; finding of judge as trier, on challenge, not reviewable. *Redfearn v. Thompson*, 551, 556. By having heard prejudicial statement of counsel to court before trial. *Martin v. State*, 799.

Grand juror's disqualification, no ground for plea in abatement. *Garnett v. State*, 109, 112.

Inspection by, of liquor introduced in evidence; proper instruction as to. *Morse v. State*, 61.

Irregularity in regard to, during trial; presumption of harm from. *Martin v. State*, 456-7. When not to be shown by juror's affidavit. *Redfearn v. Thompson*, 551.

Judge's power as to direction to, affecting verdict, in criminal case. *Register v. State*, 623. Dissenting opinion, 636.

Judge's question to, as to how they stood, of doubtful propriety. *Flahive v. State*, 401; *Peavy v. Clemons*, 507. But presumptively harmless. *Flahive v. State*, 401.

Judge's remark to, when told that they stood ten to two, amounted to undue pressure to agree, and was improper on additional grounds. *Peavy v. Clemons*, 507.

Judges of law in criminal cases, sense in which jury are. *Register v. State*, 627.

Municipal offenses, no right to jury trial for. *Flannigan v. Rome*, 217.

Objection too late, as to matter affecting. *Kidd v. State*, 148.

Polling after sentence pronounced, too late; error in imposing sentence immediately on announcement of verdict and before demand for polling could be made. *McCullough v. State*, 403.

Private knowledge of. *Grusin v. State*, 111-12; *Register v. State*, 640.

Remarks heard by juror required new trial, though he testified that they did not influence his finding. *Downer v. State*, 827.

Remarks in presence of. See *Trial*.

Separation; bad practice for judge to ask counsel in hearing of jury if they will consent to separation of jurors; but no cause for mistrial here. *Carter v. State*, 851.

JURY AND JURORS—*continued.*

Tasting thing introduced in evidence, proper instruction. *Morse v. State*, 61, 64.

Verdict not to be impeached by juror. *Redfearn v. Thompson*, 551.

Waiver of irregularity, by not making timely objection. *Kidd v. State*, 148.

JUSTICE'S COURT. See *Account*; *Appeal*; *Certiorari*.

Collecting officer, justice is. *Higdon v. Williamson*, 376.

Costs; jury fee paid by party, judgment for, when proper. *Thomas v. Monticello Vehicle Co.* 260.

Defense to suit on verified account, too late, after judgment; dismissal of appeal, proper. *Draper v. Burr Mfg. Co.* 321.

Directing verdict, not proper in. *Fine v. So. Express Co.* 161.

Interest, judgment for, from date when account became due, properly entered on verdict for principal "and interest." *Thomas v. Monticello Vehicle Co.* 260.

• Jurisdiction lost by appeal, and further proceedings in justice's court a nullity. *McDougald v. Chattanooga Medicine Co.* 653.

Jurisdiction; rule that action will be construed so as to uphold jurisdiction, in case of doubt. *Fine v. So. Express Co.* 164.

Pleading, technical, not required in. *Id.* 163.

Verdict should not be directed by justice of peace. *Id.* 161.

Void judgment of, can not be set aside by, but the justice or any other court may disregard it. *McDougald v. Chattanooga Medicine Co.* 655.

KEEPING UNLAWFULLY. See *Criminal Law*, catchwords "Lewd house;" *Liquor*.**KIDNAPPING.** See *Criminal Law*.**LABORER.** See *Criminal Law*, catchword "Cheating;" *Garnishment*; *Lien*.**LAND.** See *Damages*; *Deed*; *Ejectment*; *Landlord and Tenant*; *Partnership*; *Sale*; *Timber*; *Title*; *Trespass*.**LANDLORD AND TENANT.**

Action against third person for renting to tenant or disturbing relation with landlord; what plaintiff must show. *Rawlings v. Shepard*, 350.

Agent's authority, not include power to bind landlord to pay for improvements by tenant, where agent was employed to rent, or collect rent. *McMichen v. Brown*, 506.

Assignee of lease, rights of, as against one renting from the landlord after the lease. *Murphey v. Creamer*, 597-8.

Breach of contract of rental; rerenting to lessen damage. *Cox v. McKinley*, 493.

Contract for sale, construed as creating relation of. *Hodnett v. Mann*, 666. Contract, with notes for "rent," by which payee was obligated to make deed on payment of the notes, construed as creating relation of vendor and vendee, not landlord and tenant. *Brundrige v. State*, 816.

Crop growing and immature is not personal property, and is not recoverable by possessory warrant. *Gainous v. Martin*, 210.

LANDLORD AND TENANT—*continued*.

Crop, tenant's sale of, not criminal, here. *Robinson v. State*, 791.

Cropper's interest in growing crop, mortgageable, but not subject to levy before settlement with landlord. *Fountain v. Fountain*, 758.

Cropper's unlawful sale of crop; conviction warranted. *Alexander v. State*, 27. Not warranted. *Brundrige*, 816.

Custom of tenant, as to repairs. See catchword "Repairs," *infra*.

Damages as result of dangerous condition of premises, liability of owner. *Peterson v. Stalvey*, 649.

Delivery constructive, of landlord's part of crop. *Fletcher Guano Co. v. Vorus*, 381.

Eviction malicious, action for. *Murphey v. Creamer*, 602.

Improvements, lack of authority of agent to bind landlord to pay for. *McMichen v. Brown*, 506. Parol ratification by landlord after improvements made, not bind. *Id.*

Interference by stranger with performance of contract between. *Rawlings v. Sheppard*, 350.

"Lease," when held to be sale. *Brundrige v. State*, 816. Compare *Hodnett v. Mann*, 666.

Lewd house, when landlord may be convicted of keeping. *Fitzgerald v. State*, 70; *Cotton v. Atlanta*, 397; *Dannie v. Atlanta*, 472.

Lien of landlord on crop, for supplies to make it, is confined to the crop they were furnished to make; but where product on hand to repay him is, by agreement, used to make next year's crop, he has a lien on the latter. *Fletcher Guano Co. v. Vorus*, 380. Lien of landlord, on rescission of contract with tenant, as to sale of premises. *Hodnett v. Mann*, 666. Application of payment to, where landlord holds different claims. *Id.* 668-9. No lien for supplies for a year preceding that in which the crop was raised. *Robinson v. State*, 791.

Mortgage by cropper. See catchword "Cropper," *supra*.

Notice as to need of repairs, when and what required. *Cassel v. Randall*, 587.

Nuisance on premises, liability of owner. *Peterson v. Stalvey*, 649.

Option to tenant to purchase, contract construed as, where it provided for payment of rent on failure to pay installments of purchase-money. *Hodnett v. Mann*, 666. Compare *Brundrige v. State*, 816.

Payment to landlord, application of, as between different claims. See *Lien*, catchwords "Application of payment."

Renting agent, authority of. See catchword "Agent," *supra*.

Repairs, custom of tenant to make, and deduct cost from rent, as affecting landlord's liability for not making. *Cassel v. Randall*, 588.

Repairs, notice as to need of; what required. *Id.* 587.

Rescission of contract between, as to sale of the premises, as affecting lien for rent and supplies. *Hodnett v. Mann*, 666.

Rescission of rent contract, when not result from landlord's renting to third person, on tenant's renunciation of contract. *Coz v. McKinley*, 493.

LANDLORD AND TENANT—*continued*.

Sale of growing crop. See catchword "Cropper," *supra*.

Sale of incumbered crop. *Robinson v. State*, 791.

Sale or renting, construction of contract. See catchword "Contract," *supra*.

Well unprotected, liability for horse falling into. *Peterson v. Stalvey*, 649.

LARCENY. See *Criminal Law*.**LAWS**. See *Code*; *Code Sections*; *Constitutional Law*; *Municipal Corporation*, catchword "Ordinance;" *Statutes*; *Words and Phrases*.**LEASE**. See *Landlord and Tenant*; *Timber*.**LETTER**. See *Evidence*.**LEVY AND SALE**. See *Claim*.

Agreement of levying officer, as to disposition of property, contrary to public policy, and void, when. *James v. Pepper*, 266.

Bailment by levying officer. See catchword "Trover," *infra*.

Bond for property levied on. See *Bond*.

Collateral attack for mere irregularities, not allowed. *Horkan v. Eason*, 237.

Cropper's interest in growing crop, not subject to levy before settlement with landlord. *Fountain v. Fountain*, 758.

Cumbersome property, levy and sale without removal of. *Grace v. Finleyson*, 480. Liability on forthcoming bond for. *Id*.

Irregularities not exposing sale to collateral attack. *Horkan v. Eason*, 236-7.

Possession by defendant, recital of, in entry of levy, made *prima facie* case in behalf of plaintiff in *fi. fa.*, as against claimant. *Bank of Southwestern Georgia v. Empire Ins. Co.* 320.

Removal of heavy property, when not required. *Grace v. Finleyson*, 480.

Trover by levying officer to repossess himself of property seized and deposited with third person for safe-keeping; officer's agreement as to disposition of the property, invalid, and no defense. *James v. Pepper*, 266.

LEWD HOUSE. See *Criminal Law*.**LIBEL**. See *Slander*.**LICENSE**. See *Liquor*.**LIEN**. See *Landlord and Tenant*; *Mortgage*.

Application of payment, where lienholder is also holder of unsecured claim. *Hodnett v. Mann*, 668. See *Baumgartner v. McKinnon*, 224, and catchword "Election," *infra*.

Bankruptcy, as affecting. See *Bankruptcy*.

Demand, as prerequisite to foreclosure; proof of, not dispensed with by defendant's testimony that if made, it would have been refused. *Hutson v. Sutton*, 844.

Election by holder of lien on two things, when compelled, in favor of holder of junior lien on but one of them. *Moore v. Cofield*, 197. See catchwords "Application of payment," *supra*.

LIEN—*continued*.

Foreclosure of laborer's lien, not a suit until counter-affidavit filed.

Weston v. Beverly, 262.

Foreclosure. See catchwords "Minor defendant," *infra*.

Garnishment, foreclosure of lien is no basis for, when. *Weston v.*

Beverly, 261.

"Laborer," in lien law; when not applied to one employed as manager of store, who "did all the work" of the store, swept it, and loaded goods on drays. *Pruitt v. Pace*, 201. See *Garnishment*, catchword "Exemption."

Materialman's. See catchword "Record," *infra*.

Minor defendant's counter-affidavit converted foreclosure proceeding into mesne process; statute as to service on minors, not strictly apply; lack of guardian ad litem or *prochein ami* amendable, and cured by verdict. *Sams v. Covington Buggy Co.* 191.

Payments, application of. See catchword "Application," *supra*.

Priority of unrecorded deed. See catchword "Recording," *infra*.

Record not made, of conditional sale of personalty, lien of judgment creditor of donee of purchaser prevails as against vendor, when. *Reisman v. Wester*, 96.

Record of, what sufficient. Employee of clerk may record. Omission to make entry on original paper, showing fact of record, not affect regularity of record. *Calhoun Brick Co. v. Pattillo Lumber Co.* 181, 182. Recording in three months from delivery of last item of material constituting part of running account covered by contract, sufficient. *Id.*

Recording not necessary to give priority to deed of bargain and sale over subsequent judgment or attachment. *Smith v. Worley*, 281; (bill of sale) *Balchin v. Jones*, 434.

Rescission, as affecting. See *Landlord and Tenant*.

Service on minor, when not necessary in foreclosure proceeding. *Sams v. Covington Buggy Co.* 191.

"Suit," not include foreclosure of lien, when. *Weston v. Beverly*, 261.

Two funds, rule as to when lienholder must elect between. See catchword "Election," *supra*.

Wages. See catchword "Laborer," *supra*.

LIFE-EXPECTANCY. See *Damages*.

LIMITATIONS.

Absence of defendant, when not prevent bar. *Rawlings v. Sheppard*, 350.

Code not complete as to limitations: section 2 of act of March 6, 1856, as to trover, is of force, though not in code. *Hicks v. Moyer*, 488.

Concealment; not such as to arrest bar affecting criminal prosecution, under facts here. *Harris v. State*, 366.

Contractual; stipulation as to 60-days notice of claim, as condition of liability. *W. U. Tel. Co. v. Ford*, 606, 620.

Crime not shown to have been committed within statutory period; point must be made specifically in motion for new trial (since act of 1911). *Wall v. State*, 136.

LIMITATIONS—*continued*.

Decedent's estate; appointment of temporary administrator is not such representation as to cause statute of limitations to begin running against estate. *Baumgartner v. McKinnon*, 219.

Non-residence of one who never resided in the State, no reply to the statute. *Cooper v. Most Nursrey Co.* 352.

Trover barred after four years, by law omitted from code, but still of force. *Hicks v. Moyer*, 488.

LIQUOR.

Accessories; none in violation of liquor law; all participating are principals. *Hardu*, 47; *Toles*, 444; *Wynne v. Atlanta*, 818.

Accusation. See catchword "Indictment," *infra*.

Agency in sale; agent equally guilty with principal. *Hardu*, 47. Burden of explanation, on intermediary, not carried. *Bruner*, 82; *Stewart*, 215; *Howe*, 216. See catchword "Employee," *infra*.

Alcoholic ingredient, as affecting legality of sale. *Bush v. Hessig-Ellis Co.* 590-1.

Beer. Sale of "near beer" to minor, unlawful. *Hardu*, 47. See catchwords "Malt liquor," *infra*.

Circumstances sufficient to show unlawful keeping on hand. *Herndon*, 118; *Cassidy*, 123. The word "whisky" marked on package, bill of lading, etc., sufficient to show that the package contained whisky. *Id.* 123. Taking out U. S. license for sale, relevant, on prosecution for keeping on hand at place of business. *Id.*; *Jackson*, 143.

Circumstances tending to show sale; inference from receipt of money and delivery of liquor. *George*, 209. Omission to charge jury as to law where conviction depends on circumstantial evidence. *Id.*

Club; so-called locker club, device for keeping on hand liquor for unlawful sale. *Horne v. Macon*, 208.

Description, warranty from, as to non-alcoholic character of beverage. *Bush v. Hessig-Ellis Co.* 590-1.

Descriptive words on package, as evidence of contents. *Cassidy*, 123.

Employee convicted of keeping on hand at "his" place of business, though employer was owner of the place and the liquor. *Toles*, 444. Conviction of keeping on hand liquor at employer's place of business, not warranted by evidence. *Heard*, 546.

Evidence as to violation of liquor law. See catchwords, "Agency," "Circumstances," *supra*; "Keeping," *infra*.

Evidence that a man to whom the witness had given money to buy whisky returned with whisky, admissibility of. *Grusin*, 152.

Evils from use of intoxicants. *Langston*, 82.

Indictment for sale of malt liquor need not allege it was intoxicating. *Howe*, 216.

Indictment in different counts; effect of general verdict of guilty. *Morse*, 61, 66.

Indictment not too indefinite as to kind of intoxicating drinks sold. *Howe*, 215.

LIQUOR—*continued.*

Interstate-commerce law, as affecting contracts for sale of. *Bush v. Hessig-Ellis Co.* 589, 591.

Intoxicating effect; need not be alleged, as to malt liquor. *Howe*, 216.

Request to review decision on this point (*Stoner* case, 5 Ga. App. 716), refused. *Id.* See catchword "Whisky," *infra*.

Intoxication in residence of another. See *Criminal Law*.

Jury's inspection of liquor in evidence; proper instruction as to. *Morse v. State*, 61.

Keeping by so-called locker club, when unlawful. *Horne v. Macon*, 208.

Keeping for sale, violation of city ordinance as to, shown by proof of possession and sale in city limits. *Wynne v. Atlanta*, 818.

Keeping on hand at place of business. Jury authorized to disregard testimony as to defendant's ignorance of presence of liquor, etc. *Herring*, 89. Meaning of "keep on hand." *Cassidy*, 125. Law violated though the liquor was in an unopened package. *Id.* 123. Temporary deposit of liquor, at place of business, effect of. *Id.*; *Landreth*, 400-1. Unlawful keeping at dwelling. *Flahive*, 401. Liquor left in back yard of store, treated as kept at place of business. *Id.* 402; *Jackson*, 143. "Near beer" dealer's license, not authorize keeping intoxicating liquor. *Cassidy*, 123. Taking out U. S. license for sale, evidence on prosecution for unlawful keeping. *Id.*; *Jackson*, 143. Conviction of employee, warranted. *Toles*, 444. Not warranted. *Heard*, 546. Evidence sufficient to convict. *Herndon*, 118; *Grusin*, 149; *McGinty*, 218.

Label, as evidence of contents of package. *Cassidy*, 123.

License (U. S.) for sale of liquor, evidence as to violation of liquor law. *Cassidy*, 123. Certified copy from records of internal revenue collector, as evidence of payment of tax. *Id.*

License to "near beer" dealer, not authorize keeping on hand intoxicating liquor. *Id.*

Locker club. See catchword "Club," *supra*.

Malt liquor, indictment for sale of, need not allege it was intoxicating. *Howe*, 216. See next note.

Minor, sale of non-intoxicating malt liquor to, unlawful. *Hardu*, 47. Policy of law as to protection of minors from vicious habits. *Glenn*, 128, 130.

Name of party used in shipping liquor, with his consent, not make him guilty. *Heard*, 548.

"Near beer" defined. *Cassidy*, 128.

Non-alcoholic character, warranty as to, from description. *Bush v. Hessig-Ellis Co.* 591.

Place of business; not cease to be so while closed on Sunday. *Landreth*, 400-1. See catchword "Keeping," *supra*.

Possession of. See catchword "Keeping," *supra*.

Sale, as affected by interstate-commerce law. *Bush v. Hessig-Ellis Co.* 589, 591.

Sale; conviction upheld, though based on testimony of discredited witness. *Walker v. Atlanta*, 28; *Gordon v. State*, 35. Inference

LIQUOR—*continued.*

from receipt of money and delivery of liquor. *George*, 209. Evidence warranting conviction. *Holloway*, 49; *Grusin*, 149; *George*, 209; *Dukes*, 473; *Woodward*, 487. Conviction not warranted. *Yopp*, 458. Agency in sale. See catchword "Agency," *supra*. Sufficiency of indictment. See catchword "Indictment," *supra*.

Sale of beverage as non-alcoholic; contract not complied with by furnishing intoxicating beverage. *Bush v. Hessig-Ellis Co.* 589.

Sale under guise of so-called locker club. *Horne v. Macon*, 208.

Tax (U. S.), payment of, as evidence of violation of prohibition law. *Cassidy*, 123; *Jackson*, 143.

Warranty from description of beverage as "non-alcoholic." *Bush v. Hessig-Ellis Co.* 590-1.

Whisky shown to be such by proof that the accused treated it as whisky. *Cassidy*, 124.

LODGE. See *Insurance*.

MACHINE. See *Contract*; *Master and Servant*; *Sale*.

MAIL. See *Evidence*.

MALICIOUS MISCHIEF. See *Criminal Law*.

MALICIOUS PROSECUTION. See *Malicious Use of Process*.

Corporate liability for; national bank not liable. *Hansford v. Nat. Bank of Tifton*, 270.

MALICIOUS USE OF PROCESS. See *Malicious Prosecution*.

Distinction between action for malicious use, and action for malicious abuse. *Murphey v. Creamer*, 602.

Misjoinder, question as to. *Id.*

MALT LIQUOR. See *Liquor*.

MANAGER. See *Words and Phrases*.

MANSLAUGHTER. See *Criminal Law*.

MANUFACTURER. See *Negligence*.

MARKET VALUE. See *Evidence*.

MARRIED WOMAN. See *Husband and Wife*.

MASTER AND SERVANT.

Action against third person for interference with performance of contract between. *Rawlings v. Sheppard*, 350.

Allegations of negligence not proved, nonsuit proper, in action for injury to servant. *Thompson v. Marsh Cypress Co.* 303.

Appliances. See catchword "Defects," *infra*.

Assumption of risk, as bar to recovery by employee. *Wallace v. So. Ry. Co.* 92; *Butler v. Atlanta Buggy Co.* 175. Assumption of risk, not shown by allegations here. *C. & W. C. Ry. Co. v. Finley*, 331. Assumption of risk by locomotive fireman, as to construction of track and situation of switch. *Bowers v. So. Ry. Co.* 371, 372-3. Under act of Congress prescribing liability for injuries to railroad employees, employee may assume risk except as to things violative of statutes enacted to secure safety of employees. *Id.* 367.

MASTER AND SERVANT—*continued.*

- Burden of proof in suit against railroad company for injury to employee; proper charge to jury. *Central Ry. Co. v. McGuire*, 484.
- Contract to perform labor during the "turpentine season," not too indefinite; meaning shown by parol proof. *Peacock v. State*, 402. Contract too indefinite as to character of work to be performed. *Adams v. State*, 801.
- Custom or habit of employee in conflict with rule; rule waived by employer's acquiescence. *Seaboard Ry. v. Hunt*, 273.
- Defects of machinery, employee's knowledge of, as bar to recovery for injury. *Butler v. Atlanta Buggy Co.* 175.
- Driver's negligence; allegation that defendant was chargeable with conduct of her chauffeur, surplusage. *Fuller v. Inman*, 695.
- Duty of employer as to providing safe instrumentalities for workmen. *Butler v. Atlanta Buggy Co.* 179.
- Employer's liability act; cases to which Federal statute applies; statute not applicable to injury on interstate railroad to foreman of gang of track hands, caused by negligent stroke of hammer by one of them while relaying rail. *C. & W. C. Ry. Co. v. Anchors*, 322. Meaning of "interstate commerce." *Id.* 325. Federal statute, as affecting assumption of risk. *Bowers v. So. Ry. Co.* 367. Employee's freedom from fault need not be shown in action under. *Calhoun v. Cen. Ry. Co.* 657.
- Employer's liability act of 1909, not unconstitutional. *Chandler v. A. C. L. R. Co.* 191. Question as to constitutionality of, not properly made. *Atkinson v. Hardaway*, 389. Prima facie case against railroad company, sued for homicide of employee, made by proof that it occurred while he was discharging duties of his employment. *Id.*
- Fellow servant's negligence, master not liable for injury from. *Thompson v. Marsh Cypress Co.* 303.
- Habits or vicious temper of employee, when not relevant on issue as to employer's liability for employee's tort. *L. & N. R. Co. v. Hudson*, 169.
- Homicide by employee shooting coemployee, not within scope of employment; employer not liable. *Id.*
- Interference by stranger with performance of contract between. *Rawlings v. Sheppard*, 350.
- Injuries by employees, test as to liability for. *L. & N. R. Co. v. Hudson*, 169.
- Injuries to employees. Switchman run over by engine after giving signal to engineer, where escaping steam obscured the view between him and the engine. *Wallace v. So. Ry. Co.* 90. Wilful shooting of railroad employee by coemployee. *L. & N. R. Co. v. Hudson*, 169. Woodworker's hand jerked against revolving saw by reason of defective condition of saw, while pushing plank against it. *Butler v. Atlanta Buggy Co.* 175. By derailling of locomotive because switch was moved while the engine was passing over it. *Seaboard Ry. v. Hunt*, 273. To train-hand from heavy barrel pushed on him in loading car. *C. &*

MASTER AND SERVANT—continued.

W. C. Ry. Co. v. Finley, 329. By derailling of train, caused by trespasser turning switch. *Bowers v. So. Ry. Co.* 367. Locomotive fireman injured by collision of engine with cow. *Calhoun v. Central Ry. Co.* 657.

Instructions of employer. See catchword "Rule," *infra*.

Knowledge of defect, as bar to recovery by employee. *Butler v. Atlanta Buggy Co.* 175.

Presumption in railroad employee's suit for injury in service, before act of 1909. *Wallace v. So. Ry. Co.* 90, 94.

Risk of employee. See catchwords "Assumption of risk," *supra*.

Rule by employer; defense that injured employee was violating rule. *Seaboard Ry. v. Hunt*, 273.

Rule construed most strongly against employer, and not applied where it is doubtful whether it applies. *Id.* Employee may show that rule relied on by employer as defense was not made in good faith and with intention that it should be obeyed. *Id.* Waiver of rule, by acquiescence in customary violations. *Id.* 273. Subsequent promulgation of waived rule. *Id.* 276. Charge to jury, that if employee received rule book, "he was bound to know the rules," was properly qualified by adding: "if he had time to read and study them before the accident." *Central Ry. Co. v. McGuire*, 485.

Tort of servant, test as to master's liability for. *L. & N. R. Co. v. Hudson*, 169.

Wages. See *Garnishment*, catchword "Exemption;" *Lien*.

MAXIMS.

Generalia specialibus non derogant; repeal of laws by enactment of general statute covering the subject-matter. *Hammond v. State*, 143.

Id certum est quod certum reddi potest; applied to contract for services, the nature, extent, and time of which were left to the discretion of the party who was to render the service. *Citizens Bank v. Benton*, 308. Applied to judgment imposing punishment. *Clark v. Trippe*, 468.

Qui facit per alium facit per se; applied in suit against master for tort of servant. *L. & N. R. Co. v. Hudson*, 172.

Quod remedio destituitur ipsa re valet si culpa absit; applied as to remedy by certiorari. *Moore v. Winder*, 386.

Res ipsa loquitur; doctrine discussed and applied, in case of explosion of bottle containing carbonated beverage. *Payne v. Coca-Cola Co.* 762.

Salus populi suprema lex; referred to, in discussing law restricting right to bear arms. *Glenn v. State*, 132.

Ubi jus ibi remedium; applied as to certiorari in case not expressly provided for by statute. *Moore v. Winder*, 386.

Utile per inutile non vitiatur; applied to verdict. *Monk-Sloan Co. v. Quitman Oil Co.* 390.

MEDICAL PRACTITIONER. See *Evidence, Negligence*, catchword "Physician."

MILLING-IN-TRANSIT PRIVILEGE. See *Railroad*.

MINOR. See *Criminal Law*; *Lien*; *Parent and Child*; *Parties*; *Service*.

MISJOINDER. See *Action*; *Malicious Use of Process*.

MISNOMER. See *Criminal Law*.

MISREPRESENTATION. See *Fraud*.

MISTAKE. See *Payment*.

Officer's mistake or omission, when not defeat litigant. *Veruki v. Savannah Electric Co.* 201, 204.

MISTRIAL. See *Argument*; *Trial*.

MONEY. See *Criminal Law*.

MONEY HAD AND RECEIVED. See *Action*.

MONEY-RULE.

Equitable principles applied in distribution, in case of creditor with lien on two funds, only one of which was available to other lienholder. *Moore v. Cofield*, 197. See *Baumgartner v. McKinnon*, 224; *Hodnett v. Mann*, 668.

MORTALITY TABLES. See *Damages*, catchwords "Life-expectancy."

MORTGAGE. See *Deed*; *Lien*.

Amount not increased by parol evidence, when. *Kight v. Robinson*, 548.

Application of payments. See *Lien*.

Attestation in Florida, insufficient here. *James v. Pepper*, 266.

Bankruptcy, as affecting. See *Bankruptcy*.

Copy, admissibility of. *James v. Pepper*, 266.

Cropper's interest in growing crop, mortgageable, but not subject to levy before settlement with landlord. *Fountain v. Fountain*, 758.

Description of property, sufficiency of, a question of law, for the court; identity of the property, a jury question. *First Nat. Bank v. Spicer*, 503. Description of mule by sex, age, and color, sufficient, as a matter of law, to put purchaser on notice. *Id.* See *Deed*.

Election by mortgagee having lien on two things, when compelled, in favor of holder of junior mortgage covering only one of them. *Moore v. Cofield*, 197. See *Lien*.

Foreclosure of, on personalty; notice to mortgagor. *McFarlin v. Reeves*, 581.

Identification of property. See catchword "Description," supra.

Notice; error in allowing testimony as to absence of actual notice, where mortgage had been duly recorded. *First Nat. Bank v. Spicer*, 504.

Notice of foreclosure of chattel mortgage. *McFarlin v. Reeves*, 581.

Parol evidence not admitted to extend mortgage to debt not specified in it. *Kight v. Robinson*, 548.

Secondary evidence of lost mortgage purporting to have been executed in another State, admissibility of. *James v. Pepper*, 266.

Two funds, rule as to when lienholder must elect between. See *Lien*.

Warranty of soundness of mortgaged mule, by mortgagee; irrelevant testimony as to, prejudicial here. *First Nat. Bank v. Spicer*, 505.

MOTION. See *Judgment; New Trial*.

MUNICIPAL CORPORATION.

Accusation in writing, when not required in police court. *Wynne v. Atlanta*, 818.

Action against, for damages; act of 1899, as to notice before suit, substantially complied with. *City of Sandersville v. Stanley*, 360.

Annexed territory, duty as to discovery of defects in streets in, and liability for injuries therefrom. *Mayor &c. of Macon v. Morris*, 298.

Appeal. See catchwords "Police court," *infra*.

Bridge defective, liability for injury on. See *County*.

Cemetery of; wrongful disinterment by officer, not render city liable, when. *McDonald v. Butler*, 845.

Certiorari to review judgment of municipal court. See *Certiorari*.

Court created by conferring power on municipal authorities to try persons charged with violating ordinances. *Broadwater v. State*, 458. Oath on trial before municipal body, as basis of prosecution for perjury. *Id*.

Court, legal existence of, can not be questioned by certiorari directed to it. *Morton v. Rome*, 604. See catchwords "Police court," *infra*.

Crime; term not applicable to offense against municipality, when. *Moore v. Winder*, 387.

Crime under State law, punishment by city for act constituting. *Cotton v. Atlanta*, 397; *Dannie v. Atlanta*, 471.

Counties different including territory of city. See catchword "Venue," and see title *Certiorari*, catchwords "Municipal Corporation."

Damages; notice of claim for. See catchword "Notice," *infra*.

Damages for wrongful disinterment by officer, when not recoverable. *McDonald v. Butler*, 845.

House of ill-fame. See catchwords "Lewd house," *infra*.

Jury trial not demandable by one charged with violation of city ordinance. *Flannigan v. Rome*, 217.

Lewd house, penal law of State as to maintaining, covers matter of ordinance prescribing punishment for allowing house, or part of house, to be occupied as house of ill-fame; ordinance held invalid for this reason. *Cotton v. Atlanta*, 397; *Dannie v. Atlanta*, 471.

Liquor, violation of ordinances as to. See *Liquor*.

Notice of claim for damages, before suit against, when sufficient. *City of Sandersville v. Stanley*, 360.

Notice of defect in street, allegation of, not required in suit for injury therefrom. *Whidden v. Thomasville*, 194. Notice to policeman or employee in sanitary department, of defective condition of street or sewer, when held to be notice to city, and when not. *Mayor &c. of Macon v. Morris*, 298.

Nuisance by causing water to form a pond on private property, liability for. *Harris v. Rome*, 409.

Officers; limitation of authority of policemen, as to receiving notice,

MUNICIPAL CORPORATION—continued.

- etc. *Mayor &c. of Macon v. Morris*, 298. See catchword "Tort," infra.
- Ordinance, validity of, can not be questioned in reviewing court, when not attacked in lower court. *Coker v. Tifton*, 66.
- Police court; majority vote of council, on appeal, sufficient for decision. *Flannigan v. Rome*, 217. Police court sentence, not void for uncertainty. *Clark v. Trippe*, 467. Amendment to cure alleged uncertainty of sentence, allowed. *Id.* Accused not entitled to written accusation, unless city charter requires it. *Wynne v. Atlanta*, 818. See catchwords "Court," supra; "State offense," infra.
- Policeman, notice to, of defect in street, when notice to city. *Mayor &c. of Macon v. Morris*, 298, 301.
- Repairs in street, duty as to protection of public while making. *Holliday v. Athens*, 709.
- Rome; question as to repeal of charter of East Rome. *Morton v. Rome*, 604.
- Sanitary inspector, notice to, as to defective condition of sewers, etc., when notice to city. *Mayor &c. of Macon v. Morris*, 398.
- Sewage, damage from, to pasturage land, shown by evidence as to poisoning of stock by drinking water impregnated with it. *City of Sandersville v. Stanley*, 361.
- Sewers, notice of condition of, through notices to city employees. *Mayor &c. of Macon v. Morris*, 298, 301. Sewer or ditch obstructed so as to cause water to form a pond on private property, liability of city. *Harris v. Rome*, 409.
- State offense, power of city to punish for acts constituting. *Cotton v. Atlanta*, 397; *Dannie v. Atlanta*, 471.
- Street defect, notice of, need not be alleged in suit for injury from. *Whidden v. Thomasville*, 194. Allegations sufficient, as against general and special demurrer. *Id.* Notice of defect, to policeman, when notice to city, and when not. *Mayor &c. of Macon v. Morris*, 298, 301. Injury from obstruction by rope closing street for repairs; issues as to diligence of city and of driver of automobile running against the rope. *Holliday v. Athens*, 709. Duty as to keeping streets in safe condition. *Mayor &c. of Americus v. Gartner*, 754. Streets in recently annexed territory, liability for injuries from defects in, existing at time of annexation. *Mayor &c. of Macon v. Morris*, 298.
- Street tax, validity of charter provisions as to; requirement that all male residents between 15 and 50 years of age work on streets, or pay tax, valid, here. *Whitehead v. Vienna*, 337.
- Tax; valid street tax. *Id.*
- Tort of officer; rule as to non-liability of city. *McDonald v. Butler*, 847.
- Venue of violation of city ordinance, shown by statement that it was committed "within the city limits." *Bush v. Minter*, 60. Venue, where territory of city is in different counties, not affected by provisions of constitution as to venue of crimes. *Moore v. Winder*, 387.

MURDER. See *Criminal Law*.

MUTUAL BENEFIT SOCIETY. See *Insurance*.

MUTUALITY. See *Contract*.

NAME. See *Criminal Law*; *Liquor*.

NECESSITY. See *Words and Phrases*.

NEGLIGENCE. See *County*; *Charge of Court*; *Damages*; *Master and Servant*; *Municipal Corporation*; *Nonsuit*.

Accident, evidence making case of. *Calhoun v. Cen. Ry. Co.* 656.

Charge to jury on theory of accidental injury, proper here. *Holliday v. Athens*, 710, 713.

Allegations not proved, nonsuit proper. *Thompson v. Marsh Cypress Co.* 303. Election between allegations, not required. *C. & W. O. Ry. Co. v. Finley*, 329. Setting forth facts, followed by allegation that they amounted to negligence, sufficient. *Fuller v. Inman*, 694.

Appliances defective. See *Master and Servant*.

Automobile; failing to give warning of approach, and killing child, sufficient allegations as to negligence, etc. *Fuller v. Inman*, 680, 694-5. Averment that defendant was chargeable with conduct of her chauffeur, surplusage. *Id.*

Bottle explosion; inference of negligence. *Payne v. Rome-Coca Cola Co.* 762.

Bridge, liability for injury on. See *County*.

Care by injured person. Contributory negligence of injured employee, not so clear as to authorize nonsuit. *Wallace v. So. Ry. Co.* 94. Knowledge of defective condition of machinery, as bar to recovery by injured workman. *Butler v. Atlanta Buggy Co.* 175. Recovery for injury to railroad employee by negligence of fellow servant, not barred by contributory negligence not amounting to lack of ordinary care. *S. A. L. Ry. v. Hunt*, 273. Employee need not be faultless, to recover under Federal employer's liability act. *Calhoun v. Cen. Ry. Co.* 657. Alighting from moving train, not, as matter of law, negligence preventing recovery, when. *So. Ry. Co. v. Parham*, 531. Charge of court as to contributory negligence, proper. *So. Ry. Co. v. Orabb*, 559. Charge that plaintiff could not recover if, "by taking proper precautions," he could have avoided the injury, inaccurate, but not harmful here. *Holliday v. Athens*, 710, 714. Wanting in one using dangerous way when safe way was open to him; charge to jury on this subject, considered. *Id.* 711. Whether wanting in one driving automobile against rope stretched across street. *Id.* 709. See catchword "Emergency," *infra*.

Cause of injury. See catchwords "Proximate cause," *infra*.

Circulating a thing causing injury. *Payne v. Rome Coca-Cola Co.* 762.

Conclusion as to negligence; allegations not demurrable as stating. *Fuller v. Inman*, 694-5.

Contributory negligence. See catchword "Care," *supra*.

NEGLIGENCE—*continued.*

Control of thing causing injury, as affecting question of negligence. *Payne v. Rome Coca-Cola Co.* 764.

Custom of tenant, as to repairs, as affecting liability of landlord. *Cassel v. Randall*, 588.

Defects of machinery. See *Master and Servant*.

Driver of vehicle, negligence of. See catchword "Automobile," *supra*.

Election between acts charged, not required of plaintiff; recovery under petition alleging negligence and wilful misconduct. *C. & W. C. Ry. Co. v. Finley*, 329.

Electricity, injury by; error in granting nonsuit. *Cowart v. Waycross E. L. Co.* 26.

Emergency caused by, leading to injury in attempting to escape; liability; proper charge to jury. *Central Ry. Co. v. McGuire*, 484.

Emergency caused by opposite party, as affecting question as to negligence of one signing contract without reading it. *Patapsco Shoe Co. v. Bankston*, 675. See catchword "Excitement," *infra*.

Employer's negligence. See *Master and Servant*.

Excitement, allowance to be made for indiscreet conduct under, a matter for the jury. *So. Ry. Co. v. Crabb*, 559. And see catchword "Emergency," *supra*.

Explosion of bottle containing carbonated beverage; inference of negligence of original vendor, who made and bottled the beverage, where others were shown free from fault. *Payne v. Rome Coca-Cola Co.* 762.

Extraordinary character of occurrence, as basis of inference of negligence of one putting in circulation a thing causing injury. *Id.* 762, 764.

Fire set out on railroad right of way. See *Railroad*.

Fraud, negligence as affecting right to complain of. *Patapsco Shoe Co. v. Bankston*, 677.

Fright. See catchwords "Proximate cause," *infra*.

Highway; speed and signals of approach of automobiles, law as to, violated; action for negligence. *Fuller v. Inman*, 680, 694-5.

Holiday, receipt of telegram for transmission on, as affecting question as to diligence. *W. U. Tel. Co. v. Ford*, 606, 622.

Inference of, in case of explosion of bottle; doctrine of *maxim res ipsa loquitur* discussed. *Payne v. Rome Coca-Cola Co.* 762.

Injury in attempting to escape from position of peril caused by. See catchwords, "Emergency," "Excitement," *supra*.

Intruder, landowner under no duty as to safety of. *Peterson v. Stalvey*, 649.

Knowledge of defect in machinery, as bar to recovery by injured workman. *Butler v. Atlanta Buggy Co.* 175.

Landowner not liable for horse falling into unprotected well, when. *Peterson v. Stalvey*, 649.

Manufacturer, inference of negligence of. See catchword "Explosion," *supra*.

Medical treatment not given. See catchword "Physician," *infra*.

NEGLIGENCE—*continued*.

Noise of train, liability for injury from fright of animal, caused by. *Chance v. So. Ry. Co.* 702.

Notice of defect in street need not be alleged in suit against city for injury therefrom. *Whidden v. Thomasville*, 194.

"Ordinary care;" definition not required, in charging jury, in absence of request. *W. U. Tel. Co. v. Ford*, 606, 621.

Physician delayed in receiving telegram; action against telegraph company for loss of eye, alleged to have been caused thereby. *W. U. Tel. Co. v. Ford*, 606.

Presumption of. See catchword "Inference," *supra*, and see *Railroad*.

Premises, owner's duty to persons or animals going on. *Peterson v. Stalvey*, 649.

Proximate cause, meaning of. *Bowers v. So. Ry. Co.* 372. Proximate cause of injury from derailling of train, act of trespasser turning switch, not speed of train or situation of switch. *Id.* 372. Putting passenger off train at wrong place, not proximate cause of damage by illness from rain that began later. *So. Ry. Co. v. Cartledge*, 523. Proximate cause of loss of eye, whether delay in delivering telegram to physician. *Western Union Tel. Co. v. Ford*, 606. Proximate cause of injury to runaway horse falling into unprotected well, fright, not condition of well. *Peterson v. Stalvey*, 649. Proximate cause of loss, whether non-delivery of telegram; cases collected. *Cronheim v. Postal Tel. Co.* 725.

Railroad injuries caused by negligence. See *Railroad*.

Res ipsa loquitur; doctrine discussed and applied. *Payne v. Rome Coca-Cola Co.* 762.

Seller of thing causing injury; liability of. *Id.*

Street, negligence of city as to. See *Municipal Corporation*.

Telegraph company's negligence. See *Telegraph Company*.

Temptation put in the way of another, to commit wrongful act. *Bowers v. So. Ry. Co.* 373.

Trespasser's act, liability of railroad company for injury from. *Id.*

Trespasser, landowner not liable for injury to horse driven by, falling into unprotected well. *Peterson v. Stalvey*, 649.

Unusual character of occurrence. See catchword "Extraordinary," *supra*.

Vehicle, negligence of driver of. See catchword "Automobile," *supra*.

Well unprotected, liability for injury to horse falling into. *Peterson v. Stalvey*, 649.

Wilful misconduct and negligence also alleged; plaintiff not required to elect between them. *O. & W. C. Ry. Co. v. Finley*, 329.

NEGOTIABLE INSTRUMENT. See *Check*; *Promissory Note*.NEW TRIAL. See *Practice in Court of Appeals*.

Amendment of plea, refusal to allow, not proper ground of motion for new trial. *McFarland v. Lee*, 698.

Approval of brief of evidence, etc.; discretion in refusing to approve, not reviewable. *Martin v. Mendel*, 421-2.

Brief of evidence. Brief without abridgment of documentary evidence, not considered. *Brooke v. Waller*, 346. Approval refused by

NEW TRIAL—*continued.*

- judge unable to remember evidence; dismissal of motion for new trial. *Martin v. Mendel*, 417. Judge's duty as to correction of brief. *Id.* 421. Correction of, in vacation, after approval. *Atkinson v. Hardaway*, 389. Writ of error not dismissed because of matter omitted from brief. *Loyless v. Hesse Envelope Co.* 664.
- Certiorari, new trial on. See *Certiorari*.
- Correction of record, judge's power as to. *Atkinson v. Hardaway*, 389.
- Demurrer, rulings on, not proper ground of motion for new trial. *Patapsco Shoe Co. v. Bankston*, 678; *Mack v. State*, 835. Reviewable only on timely assignment of error in bill of exceptions. *Farmers Oil Co. v. Sou. Refining Co.* 415.
- Dismissal and reinstatement of motion for; validity of order reinstating, not attacked in proper time and mode. *Chance v. So. Ry. Co.* 702.
- Error harmless, not cause for. *Higdon v. Williamson*, 379. Error harmless, in admitting hearsay and irrelevant testimony, here. *Garnett v. State*, 114. See *Charge of Court; Evidence*.
- Error waived by not objecting before verdict. *Kidd v. State*, 148
- Evidence rebutting presumption of negligence against railroad company, as to stock killed by train, required new trial. *A. C. L. R. Co. v. Whitaker*, 207.
- Evidence, sufficiency of, to uphold verdict, not dependent on number of witnesses. *Martin v. Dunbar*, 287.
- Extraordinary motion for, based on newly discovered evidence, refused; discretion not abused. *Kirk v. State*, 450.
- First grant of, general, affirmed; exceptions to charge of court, etc., not considered, presumption being that on next trial the judge will correct errors. *Georgia Automobile Co. v. Merchants Nat. Bank*, 280.
- Grounds. Ground that verdict is contrary to evidence, or without evidence to support it, necessary, to authorize new trial for this reason. *Ga., Fla. & Ala. Ry. Co. v. Fla. & Ga. Tobacco Co.* 38. Verdict against weight of evidence, no ground for Court of Appeals to set it aside, if supported by some evidence. *Wilson v. Barnard*, 99. Ground as to refusal to allow witness to testify should set forth the expected testimony. *Dennis v. State*, 219. Ground as to admissibility of evidence, not stating objection at trial, not considered. *Martin v. Dunbar*, 287; *Murphey v. Creamer*, 593; *Register v. State*, 623. Ground as charge of court, too general. *Robinson v. Rothchilds*, 237. Ground excepting to charge of court as a whole presents no question for decision. *Central Ry. Co. v. McGuire*, 485. Ground that charge to jury was not authorized, and was "otherwise illegal," is too general. *Malloch v. Kicklighter*, 605. Grounds not verified by judge, not considered. *Patrick v. Shields*, 506; *Mack v. State*, 835. See catchword "Specific," *infra*.
- Impeachment of sole witness for prosecution, no reason for appellate court to set aside conviction. *Gordon v. State*, 36.

NEW TRIAL—*continued.*

Justice substantially reached, litigation should end. *Mizell Live Stock Co. v. Banks*, 366.

Newly discovered evidence, as ground for. Evidence merely cumulative and impeaching, and not likely to produce a different result, not cause for. *C. & W. C. Ry. Co. v. Finley*, 329; *Atkinson v. Hardaway*, 390; *Holliday v. Atlanta*, 710. New trial not required by. *Stewart v. State*, 215; *Kirk v. State*, 450. Newly discovered evidence as to venue, not require new trial, here. *Campbell v. State*, 790.

Specific ground required as to failure to prove venue or time of offense (since act of 1911). *Wall v. State*, 136.

Vacation, power in, as to correction of approved brief of evidence. *Atkinson v. Hardaway*, 389.

Verdict without evidence to support it, no reason for granting new trial, in absence of assignment of error on this ground. *Ga., Fla. & Ala. Ry. Co. v. Fla. & Ga. Tobacco Co.* 38.

Waiver of errors. See catchwords "Error waived," *supra*.

NEWLY DISCOVERED EVIDENCE. See *New Trial*.

NEXT FRIEND. See *Parties*, catchword "Minor."

NON EST FACTUM. See *Pleading*.

NON-RESIDENT. See *Domicile; Corporation; Limitations*.

NONSUIT.

Allegations not proved as laid, nonsuit proper. *Miller Grocery Co. v. Eastport Sardine Co.* 287; *Thompson v. Marsh Cypress Co.* 303; *Harris v. Paulk*, 334, 336.

Conflict in testimony of plaintiff's witnesses, no reason for nonsuit. *Outcault Advertising Co. v. American Furniture Co.* 211. Aliter as to plaintiff's own testimony. *Harris v. Paulk*, 336.

Negligence, issue as to, for jury. *Wallace v. So. Ry. Co.* 90.

Negligence of master; nonsuit on evidence that defective condition of machine was obvious and known to servant suing for injury from it. *Butler v. Atlanta Buggy Co.* 175.

NOTE. See *Promissory Note*.

NOTICE. See *Mortgage; Municipal Corporation; Promissory Note; Sale; Service; Telegraph Company; Title*.

Absence of actual notice of duly recorded mortgage; error in allowing testimony as to. *First Nat. Bank v. Spicer*, 504.

Claim, stipulation as to time of notice of, as condition precedent to suit against carrier, reasonable. *Roberts v. G. S. & F. Ry. Co.* 100. Waiver of stipulation. *Id.*

Record. See *Deed; Lien*.

Reputation, as tending to show notice. *Fitzgerald v. State*, 70, 72-3.

NUDUM PACTUM. See *Contract*.

NUISANCE. See *Landlord and Tenant; Municipal Corporation*.

Criminal; sufficiency of indictment for. *Central Georgia Power Co. v. State*, 448.

Pond causing malaria, etc.; indictment against power company creating. *Id.*

OATH. See *Criminal Law*, catchword "Perjury."

OFFER. See *Contract*.

OFFICER. See *Clerk of Superior Court*; *Corporation*; *Criminal Law*, catchwords, "Arrest," "Solicitor;" *Municipal Corporation*.

Delegation of authority of, to employee. *Calhoun Brick Co. v. Pattillo Lumber Co.* 183.

Presumption as to performance of duty by. *Veruki v. Savannah Electric Co.* 203.

Qualification of prosecuting officer, not brought in question by plea in abatement to accusation drawn by him. *Bush v. State*, 544.
How brought in question. *Id.* 545-6.

Quo warranto, to show vacating of office by change of residence. *Id.*
Removal from county, when must be judicially ascertained before office is vacated thereby. *Id.* 544.

OPTION. See *Contract*.

ORDINANCE. See *Municipal Corporation*.

ORGANIZERS. See *Corporation*.

OWNERSHIP. See *Title*.

PAIN. See *Damages*; *Evidence*.

PARENT AND CHILD.

Abandonment of child. See *Criminal Law*, catchword "Child."

Action by mother against father, for amount expended for necessities for children. *McCarter v. McCarter*, 754.

Defense; right of defense of each other. *Brown v. State*, 56.

Dependence of parent on child, as basis of action for homicide, what required. *Fuller v. Inman*, 680.

Father's rights not released by contract. *McCarter v. McCarter*, 754.

Homicide in protection of daughter's virtue. *Brown v. State*, 50, 56.

Homicide of child six years of age, mother's suit for, maintainable, though father was contributing to support of family; allegations sufficient as to dependency, child's earning capacity, etc. Former decisions discussed. *Fuller v. Inman*, 680.

Kidnapping. See *Criminal Law*.

Support of children, father not relieved of, by contract of separation and provisions as to custody, here. *McCarter v. McCarter*, 754.

PAROL EVIDENCE AND PAROL AGREEMENTS. See *Evidence*; *Statute of Frauds*.

PARTIES. See *Contract*.

Amendment substituting another as plaintiff, suing for use of original plaintiff. *Metropolitan Ins. Co. v. Morrow*, 433; *Dickson v. Matthews*, 542; *Musgrove v. Luther Pub. Co.* 650; *West v. Morris*, 651; *Bales v. Bank*, 703.

Assignor made nominal plaintiff, by amendment. *Metropolitan L. Ins. Co. v. Morrow*, 433.

"Defendant," when held to mean defendants. *Monk-Sloan Supply Co. v. Quitman Oil Co.* 391.

Minor filing counter-affidavit in foreclosure proceeding; lack of prochein ami or guardian ad litem amendable, and cured by verdict. *Sams v. Covington Buggy Co.* 191.

PARTIES—continued.

Process, prayer for, when not amendable by substitution of different defendant. *White v. Brown*, 530.

Representative character of. See catchword "Amendment," supra.

Singular includes plural, etc., when, in using the words "plaintiff," "defendant," etc. *Monk-Sloan Supply Co. v. Quitman Oil Co.* 391.

Uses. See catchword "Amendment," supra; and see *Action*.

PARTNERSHIP.

Appeal and bond in case of. *Gray & Dudley Co. v. Cornelia Furniture Co.*, 605.

Authority of partner to employ real-estate agent to sell land of firm. *Hubbard v. Shaw*, 487.

Contribution; law as to control of fl. fa. by codefendant paying, applies to execution against partners, when. *Higdon v. Williamson*, 376.

Corporators or promoters, when liable as partners. See *Corporation*.

Deed to realty, authority of partner to make. *Cherry Lake Co. v. Lanier Armstrong Co.* 343.

Judgment against, effect of. *Higdon v. Williamson*, 376. Judgment against firm alone, not enforceable against individual assets of member. *Flowers v. Strickland*, 739.

Land, authority of partner to convey. *Cherry Lake Co. v. Lanier Armstrong Co.* 343.

PAYMENT.

Action for use of party reimbursing nominal plaintiff, for payment made on forged indorsement; raises no question of liability to usee named. *Yatesville Bkg. Co. v. Fourth Nat. Bank*, 1.

Application of, by creditor, where not directed by debtor. *Baumgartner v. McKinnon*, 219. Application of, where lienholder is also holder of unsecured claim. *Hodnett v. Mann*, 668. By one having lien on two things. *Moore v. Cofield*, 197.

Assignment of debt, debtor with notice of, not discharged by payment to assignor. *Metropolitan Ins. Co. v. Morrow*, 433.

Collecting officer, justice of peace is. *Higdon v. Williamson*, 376.

Consideration of contract of sale, to be paid from proceeds of profits of the property sold, not invalid. *Murphey v. Creamer*, 593, 599.

Custom as to time of, for goods purchased, error in admitting testimony as to, in case of express agreement as to time. *Patapsco Shoe Co. v. Bankston*, 676, 678.

Mistake in, by debtor ignorant of amount due. *Prince v. Cochran*, 495. Money paid by mistake to agent; when recoverable, and when not. *Rogers v. Durrence*, 657.

Overpayments, recovery of. *Prince v. Cochran*, 495.

Plea of, defective; good as against motion to dismiss, made at trial term: also good as cross-action to recover overpayments. *Id.*

Presumption from giving note, that prior debts of payee to maker have been settled. *Fletcher v. Young*, 183. See *Nat. Duck Mills v. Catlin*, 246.

PAYMENT—*continued.*

Presumption of: facts from which presumed. *Fletcher v. Young*, 184, 189.

Recovery of money paid on forged indorsement. *Yatesville Bkg. Co. v. Fourth Nat. Bank*, 1.

Surety not released by creditor's application of payment to younger debt, when. *Baumgartner v. McKinnon*, 219.

"Take up" note, meaning of. *Bridges v. Phillips*, 279.

Time and place of, immateriality of evidence as to. *Fletcher v. Young*, 184.

Time for payment of consideration, indefiniteness of, as affecting validity of contract. *Murphy v. Creamer*, 593, 598, 603.

PHYSICIAN. See *Evidence*; *Negligence*.

PISTOL. See *Criminal Law*.

PLACE OF BUSINESS. See *Criminal Law*; *Liquor*.

PLEADING. See *Account*; *Action*; *Amendment*; *Criminal Law*.

Abatement; disqualification of grand juror, no ground for plea. *Garnett v. State*, 109, 112. Plea in, alleging disqualification of prosecuting officer, not entertained. *Bush v. State*, 544. Plea in, to accusation; filed in due time. *Id.* 545. Abatement, judgment on plea of; when no bar to subsequent suit. *Beckwith v. Mansfield Lumber Co.* 346. Abatement because of pendency of prior suit. *Rosenheim Shoe Co. v. Horne*, 582.

Admission, evasive answer treated as. *McNamara v. Georgia Cotton Co.* 669.

Alteration of, not matter for demurrer. *Gunn v. State*, 819.

Answer insufficient as defense to note sued on, no error in striking it and rendering judgment for plaintiff. *Coleman v. Mullis*, 175. Answer insufficient: that "from the best information defendant can obtain, plaintiff is not entitled to recover of defendant as executor any amount whatever." *Moss v. Anderson*, 785. Not enough to amend by. *Id.* Answer evasive, treated as admission. *McNamara v. Georgia Cotton Co.* 671.

Certainty; rule as to what required. *Flint River R. Co. v. Maples*, 573.

Charge of court excluding defense not sustained by evidence, not error. *Hickman v. Bell*, 319.

"Close to," when not too indefinite in description. *Fuller v. Inman*, 694.

Conclusion, allegations not demurrable as stating. *Id.*

Construction; rule as to when singular includes plural. *Monk-Sloan Co. v. Quitman Oil Co.* 391. Construed most strongly against pleader. *Fuller v. Inman*, 690. Allegation that child was 6 or 7 years of age, held to mean 6. *Id.*

Default, when not opened in city court. *Tenn. Oil Co. v. American Art Works*, 45. Refusal to open default, error here. *Slack v. Elkins*, 571.

Demurrer, judgment on, not excepted to, is law of the case. *Murphy v. Creamer*, 593.

PLEADING—*continued*.

Demurrer, ruling on, not proper ground of motion for new trial. *Farmers Oil Co. v. Sou. Refining Co.* 415; *Putapsco Shoe Co. v. Bankston*, 678. Mode of excepting to. See *Practice in Court of Appeals*.

Demurrer special, purpose of, discussed. *Fuller v. Inman*, 693.

Denial of indebtedness, insufficient to amend by, here. *Moss v. Anderson*, 785.

Duplicity in indictment. *Lawrence v. State*, 786, 788.

Election between allegations of negligence, not required. *C. & W. C. Ry. Co. v. Finley*, 329.

Equitable pleading in aid of garnishment. *Smith v. Worley*, 280.

Error in disallowing amendment rendered subsequent proceedings nugatory. *Heard v. Camp*, 168.

Evasive answer treated as admission. *McNamara v. Georgia Cotton Co.* 671.

Exception to judgment striking pleas, how made. *Prince v. Cochran*, 495. Not good, without exception to final judgment. *McCranie v. Shipp*, 544.

"Filing," meaning of. *Veruki v. Savannah Electric Co.* 201.

Garnishment, equitable pleading in aid of. *Smith v. Worley*, 280.

Justice's court; pleading in. See *Justice's Court*.

Negligence, allegations as to. See *Negligence*.

Non est factum, plea of, to suit on note, requires plaintiff to prove execution of the note, before presumption that he is bona fide holder would arise. *Wilson v. Barnard*, 99. Authorizes proof of material alteration. *Id.* 98. Forgery of title shown without plea of, when. *Citizens Bank v. Peoples*, 703.

Payment, defective plea of, good as against motion to dismiss, made at trial term; also good as cross-action to recover overpayments. *Prince v. Cochran*, 495.

Recoupment; estoppel by failure to plead. *National Duck Mills v. Catlin*, 244. See next note.

Set-off distinguished from recoupment, as to effect. *Id.* Set-off, as to damages on account of wrongful delay in selling, allowed in suit by factor for advances on cotton consigned for sale. *Frost v. Powell*, 95. Set-off against agent, where suit is by concealed principal. *A. C. L. R. Co. v. Gordon*, 311. Set-off against beneficiary allowed, where plaintiff sues for another. *Summers v. Lee*, 441.

Statute of this State need not be pleaded. *Atkinson v. Hardaway*, 390.

Striking defendant's pleas, exception to, not good, without exception to final judgment. *McCranie v. Shipp*, 544.

Value; aggregate stated, without giving separate values of articles sued for in trover, no ground for demurrer. *McCord v. Hill*, 354.

Waiver of irregularity in process, by appearance and pleading. *Sartorius v. Paper Mills Co.* 522.

PLEDGE. See *Collateral Security*; *Trover*.

POINTING PISTOL. See *Criminal Law*, catchword "Weapon."

POLICE COURT. See *Municipal Corporation*.

POLICE POWER. See *Criminal Law*.

POLICY OF INSURANCE. See *Insurance*.

POLLING JURORS. See *Jury*.

POSSESSION. See *Evidence*; *Forcible Entry and Detainer*; *Fraud*; *Levy and Sale*; *Possessory Warrant*; *Title*; *Trespass*.

POSSESSORY WARRANT.

Crops growing and immature are not recoverable by; not being personal property. *Gainous v. Martin*, 210.

Remedy not available where defendant's possession had not been acquired in a mode specified in the statute (Civil Code, § 5371). *Henderson v. De Medicis*, 190.

POSTPONEMENT OF TRIAL. See *Continuance*.

PRACTICE. See *Action*; *Amendment*; *Appeal*; *Certiorari*; *Charge of Court*; *City Court*; *Criminal Law*; *Evidence*; *Garnishment*; *Judge*; *Judgment*; *Jurisdiction*; *Jury*; *Justice's Court*; *New Trial*; *Nonsuit*; *Pleading*; *Practice in Court of Appeals*; *Trial*; *Verdict*; *Witness*.

PRACTICE IN COURT OF APPEALS.

Amendment, assignment of error not sufficient to raise question as to error in allowing. *Blocker v. Irvine*, 26.

Assignment of error, as to overruling demurrer, not reach error in allowing amendment. *Id.* General assignment of error, as to sustaining general demurrer, sufficient. *Whidden v. Thomasville*, 194. As to striking pleas, sufficient, where followed by exception to final judgment. *Prince v. Cochran*, 495; *Acme Brewing Co. v. Rahr Sons Co.* 565. Assignment of error, as to insufficiency of evidence to support verdict, is necessary, to authorize new trial for that reason. *Ga., Fla. & Ala. Ry. Co. v. Fla. & Ga. Tobacco Co.* 38. Assignments of error not referred to in brief of counsel, treated as abandoned. *Martin v. Dunbar* 287. See *New Trial*, catchword "Grounds."

Bill of exceptions. Time of filing must be within 15 days from date of judge's certificate. *Foote & Davies Co. v. Evans Furniture Co.* 194. Additional certificate not compelled by mandamus. *Scott v. Turner*, 560. Dismissal because recitals of fact as to sole assignment of error were not certified to be true. *Id.* Not dismissed because of matter omitted from brief of evidence. *Loyless v. Hesse Envelope Co.* 664. See catchwords, "Assignment of error," supra; "Brief of evidence," "Final judgment," "Parties," "Premature," infra.

Brief for plaintiff in error; point omitted from, treated as abandoned. *Garnett v. State*, 109.

Brief of evidence not properly made, in bill of exceptions; writ of error dismissed. *Brooke v. Walker*, 346. See *New Trial*.

Certification to Supreme Court, when refused. *Morton v. Rome*, 604.

PRACTICE IN COURT OF APPEALS—continued.

- Certified questions from Court of Appeals to Supreme Court. *Wilensky v. Central Ry. Co.* 8; *Baumgartner v. McKinnon*, 219; *Early County v. Baker County*, 305; *Haygood v. State*, 394; *Peters v. Queen Ins. Co.* 479; *U. S. Casualty Co. v. Newman*, 479; *Cook v. State*, 580; *Daniel v. Persons*, 830.
- Delay, bringing up case for; damages awarded. *Washington County v. Holliman*, 322; *Sartorius v. Paper Mills Co.* 522; *Christie v. Shingler*, 529; *Campbell v. Alkahest Lyceum System*, 839. Damages awarded, where no question of law was raised, and evidence was in conflict. *Barwick v. Slaughter*, 544.
- Demurrer; writ of error lies from judgment sustaining general demurrer to petition. *Whidden v. Thomasville*, 194. Assignment of error general, sufficient as to sustaining general demurrer. *Id.* Exception in motion for new trial, as to ruling on, not considered. *Farmers Oil Co. v. Sou. Refining Co.* 415; *Patapsco Shoe Co. v. Bankston*, 678. Judgment on, not excepted to, is law of the case. *Murphey v. Creamer*, 593. Direction, on reversal of judgment as to general demurrer, to hear special demurrer and cause pleading to be made more certain. *National Duck Mills v. Catlin*, 240. As to demurrer to plea, see catchword "Pleas," *infra*.
- Directions by Court of Appeals: To increase amount of judgment, in order to cure error in calculation as to amount of verdict. *Avery v. Thomason*, 11. To accept tender of fine and discharge prisoner. *Abram v. Maples*, 141. Direction, in certiorari case, as to new trial. *Hazzard v. Mayor*, 191. See catchword "Demurrer," *supra*.
- Error in calculation as to amount of verdict, cured by direction. *Avery v. Thomason*, 11.
- Filing not entered on papers, not ground to dismiss, when. *Veruki v. Savannah Electric Co.* 201.
- Filing, time of. See catchwords "Bill of exceptions," *supra*.
- Final judgment, exception to, in order to bring up exception to judgment striking pleas. *Prince v. Cochran*, 495; *Acme Brewing Co. v. Rahr Sons Co.* 565. Final judgment not excepted to, writ of error dismissed. *McCranie v. Shipp*, 544. Striking defendant's pleas is not final judgment. *Id.* Overruling demurrer to plea is not. *Hyland Chemical Co. v. Goddard*, 13.
- Final judgment from which writ of error lies: judgment sustaining demurrer to petition. *Whidden v. Thomasville*, 194.
- Final judgment, refusal to allow demand for trial entered is not. *Sharpe v. State*, 212; *Maples v. State*, 786.
- Former decision, as to sufficiency of evidence to withstand motion for nonsuit, conclusive as to sufficiency of substantially the same evidence on second trial. *Hunnicut v. Graves*, 12. Former decision in same case controlled it; damages awarded for bringing up case again. *Washington County v. Holliman*, 322.
- Jurisdiction to review issues of fact, Court of Appeals has not. *Cook v. State*, 219.

PRACTICE IN COURT OF APPEALS—*continued*.

Mandamus for second certificate by judge, refused. *Scott v. Turner*, 560.

Mistake or omission in sending up papers, when not ground to dismiss.

Veruki v. Savannah Electric Co. 201, 204.

Parties to bill of exceptions, sufficient certainty as to. *Rosenheim Shoe Co. v. Horne*, 582.

Pleas stricken, proper mode of excepting. *Prince v. Cochran*, 495; *McCranie v. Shipp*, 544; *Acme Breicing Co. v. Rahr Sons Co.* 565.

Premature writ of error, as to overruling demurrer to plea. *Hyland Chemical Co. v. Goddard*, 13. As to order refusing to allow demand for trial in criminal case to be entered on minutes of court. *Sharpe v. State*, 212. See catchwords "Final judgment," *supra*.

Question not raised in lower court, not decided by Court of Appeals. *Grant v. General Baptist Convention*, 392; *Duren v. Layton*, 394.

Time. "Immediately," in bill of exceptions, treated as meaning "instantly," "at once." *McCullough v. State*, 407. See catchwords "Bill of exceptions," *supra*.

PREMISES DANGEROUS. See *Negligence*.

PREMIUM. See *Insurance*.

PREPARATION FOR TRIAL. See *Continuance*.

PRESENCE. See *Words and Phrases*.

PRESUMPTION.

Act of 1906 as to, in case death results from injury to railroad employee, applies only to causes of action arising after its passage. *Wallace v. So. Ry. Co.* 90, 94.

Counter-claims, waiver of, when presumed from giving note. *National Duck Mills v. Catlin*, 246.

Harm from irregularity in trial, when presumed. *Martin v. State*, 456-7.

Inference of negligence; *res ipsa loquitur*. *Payne v. Coca Cola Co.* 762.

Innocence; error in charge of court disregarding presumption of, by charging that on proof of enumerated acts deemed presumptive evidence of criminal intent, the burden of proving innocence would be on defendant. *Fuller v. State*, 117.

Innocence of plaintiff suing for slander imputing crime, presumption as to. *Redfearn v. Thompson*, 550.

Intent to kill, not presumed where no death. *Hunter v. State*, 831.

Intestacy presumed until proof of will. *Atkinson v. Hardaway*, 389.

Juror presumed to have been influenced by remarks heard by him, prejudicial to accused. *Downer v. State*, 829.

Letter, presumption as to receipt of, where properly addressed and duly mailed; rebutted. *Cassel v. Randall*, 587.

Malice, presumption of, in case of destruction of another's fence. *Woods v. State*, 476, 479.

Negligence, presumption of. See catchword "Inference," *supra*, and see *Railroad*.

PRESUMPTION—*continued*.

Officer's performance of duty, when presumed. *Veruki v. Savannah Electric Co.* 203.

Ownership in defendant in fl. fa., presumption of, from levying officer's entry reciting possession. *Moore v. Kendall*, 375.

Railroad injuries, presumptions in cases of. See *Railroad*.

Res ipsa loquitur; doctrine discussed. *Payne v. Rome Coca-Cola Co.* 762.

Slander; presumption in suit for. *Redfearn v. Thompson*, 350.

Statutory presumptions; general rule that they apply to causes of action antedating the statute, not applicable, when. *Wallace v. So. Ry. Co.* 94.

Waiver of counter-claim, when presumed. *National Duck Mills v. Catlin*, 246.

PRINCIPAL AND AGENT. See *Liquor*.

Action by agent, for damages on account of non-delivery of telegram sent for principal. *Cronheim v. Postal Tel. Co.* 729-30.

Advances by sales agent; damages for failure to make. *National Duck Mills v. Catlin*, 240.

Admission by agent; letter of general manager to roadmaster, admissible against railroad company, here. *G. & F. Ry. v. Johnson*, 101.

Advice negligent, of agent; liability for. *Nat. Produce Co. v. Cairo Melon Growers Asso.* 338.

Agency not proved by letter-head and signing as agent. *Michigan Mutual Ins. Co. v. Parker*, 697.

Agent not liable for breach of warranty in sale. *Pyle v. Booz*, 760.

Authority conferred by parol to make contract of a kind required to be in writing. *Wesley v. Boyd*, 9; *McNamara v. Georgia Cotton Co.* 669. See catchword "Ratification," *infra*.

Authority of one employed to do work, to buy material in employer's name, not shown; employer not liable. *Dickson v. Matthews*, 542.

Authority of one employed to rent, or collect rent, not include power to bind landlord to pay for improvements. *McMicken v. Brown*, 506.

Authority of salesman, as to representations; limitation of, in contract. *Case Threshing Machine Co. v. Ezzell*, 647.

Authority, what implied from title of general manager; authority of general manager of gin and warehouse company, as to contracts. *Nunez Gin & Warehouse Co.* 350. Authority of one signing as "general agent." *Michigan Mutual Ins. Co. v. Parker*, 697. Authority to release debtor, not shown by proving employment as "general agent." *Id.*

Bank's agency to collect check deposited, when revocable. *Cronheim v. Postal Tel. Co.* 716, 721.

Broker's right to commissions. See catchword "Commission," *infra*.

Collection, agency of bank for, as to check; effect of indorsement. *Cronheim v. Postal Tel. Co.* 716, 721.

PRINCIPAL AND AGENT—*continued.*

- Commission on sale of land, when recoverable by broker. *Hunnicut v. Graves*, 12. When not recoverable from owner selling in period during which, under contract, the agency was to be "irrevocable." *Moore v. May*, 198. Commission of broker, under contract between vendor and vendee, recoverable in name of vendor, suing for use of broker. *West v. Morris*, 651.
- Communications between, by letter; proof of genuineness. *Nat. Produce Co. v. Cairo Melon Growers Asso.* 338.
- Concealed principal; rule that counter-claim against agent may be set off, where concealed principal sues, not applicable here. *A. C. L. R. Co. v. Gordon*, 311.
- Confidential communication, letter of general manager of railroad to roadmaster was not. *Ga. & Fla. Ry. v. Johnson*, 101.
- Counter-claim against agent. See catchwords "Concealed principal," *supra*.
- Damage to principal from agent's negligent advice; liability of agent. *Nat. Produce Co. v. Cairo Melon Growers Asso.* 338.
- Damages against purchasing agent, on account of defects in goods bought; when not recoverable. *National Duck Mills v. Catlin*, 240.
- Declarations of agent not admissible to prove agency. *Michigan Mutual Ins. Co. v. Parker*, 697.
- Disobedience of instruction as to selling, damages for. *Frost v. Powell*, 95; *Wood v. Jones*, 735.
- Employment of agent, contract for, not wanting in mutuality, though it left to his discretion the nature, extent, and time of the service. *Citizens Bank v. Benton*, 308.
- Exclusive agency, not created by stipulation that the agency should be "irrevocable" for a stated time. *Moore v. May*, 199.
- Factor's liability for not complying with direction as to sale; damages set off against factor's claim for advances. *Frost v. Powell*, 95; *Wood v. Jones*, 735.
- Factor's powers, when coupled with an interest. *Id.*
- Factor's sale to cover advances. *Wood v. Jones*, 737-8.
- General agent, authority of, to release of debtor, not shown. *Michigan Mutual Ins. Co. v. Parker*, 697.
- General manager, authority implied from title of, as to contracts. *Nunes Gin & Warehouse Co. v. Moore*, 350.
- "Good faith," on part of principal to agent employed to sell on commission. *Moore v. May*, 200.
- Instructions, disobedience of. See catchword "Factor," *supra*.
- "Irrevocable," meaning of, in contract of agency; not equivalent to "exclusive." *Moore v. May*, 199.
- Letter with "general agent" after signer's name, and with name of company in printed heading, not admissible against company, when. *Michigan Mutual Ins. Co. v. Parker*, 697.
- Mistake in overpaying agent; recovery from him, when allowed, and when not. *Rogers v. Durrence*, 657.
- Negligent advice to principal; liability of sales agent; relevancy of evidence. *Nat. Produce Co. v. Cairo Melon Growers Asso.* 338.

PRINCIPAL AND AGENT—continued.

Ratification parol, of agent's written contract, as to improvements on land, not bind principal, when. *McMichen v. Brown*, 506.

Real-estate agent. See catchword "Commission," supra.

Renting agent, authority of. *McMichen v. Brown*, 506.

Reports of agent; admissibility of letters purporting to be from agent. *Nat. Produce Co. v. Cairo Melon Growers Asso.* 338.

Undisclosed principal. See catchwords "Concealed principal," supra.

PRINCIPAL AND SURETY. See Bond.

Agreement to assume debt of another, when required to be in writing. *Harris v. Paulk*, 334.

"Compounding" with debtor, meaning of. *Williams-Thompson Co. v. Williams*, 252.

Discharge of surety, not result from agreement without consideration. *Id.* 251. Not result from payment of surety's ratable part by third person. *Id.* 252. Not result from creditor's application of payment to younger debt, when. *Baumgartner v. McKinnon*, 219. Not result from payee's failure to sue maker of note. *Id.* 226. Discharge of surety on recognizance, by imprisonment of principal for different offense. *Cooper v. Brown*, 730. See *Bond*, catchword "Forfeiture."

Inability to produce principal, because in custody under a different charge. *Cooper v. Brown*, 730.

Married woman, collusive scheme to evade statute against suretyship by. *Summers v. Lee*, 441.

PRIORITY. See *Bank*, catchword "Insolvent;" *Deed*, catchword "Recording."

PRISONER'S STATEMENT. See *Criminal Law*, catchword "Statement."

PRIVITY. See *Contract*.

PROCESS. See *Service*.

Amendment of prayer for, by substitution of different defendant, not allowed, when. *White v. Brown*, 530.

Dismissal for alleged defects in; motion to dismiss not sustained. *Coleman v. Mullis*, 175.

Irregularity in, waived by appearance and pleading. *Sartorius v. Paper Mills Co.* 522.

Prayer for, when not amendable as to defendant. *White v. Brown*, 530. Void because directed to defendant not named in petition. *Id.*

PROCHEIN AMI. See *Parties*, catchword "Minor."

PROFANITY. See *Criminal Law*, catchword "Words."

PROHIBITION. See *Liquor*.

PROMISSORY NOTE.

Action on, for use; amendment of. *Bales v. First Nat. Bank*, 703.

Alteration of. See *Alteration*.

Amendment correcting copy of note sued on. *Sartorius v. Paper Mills Co.* 522.

Answer insufficient as defense to; no error in striking it and rendering judgment for plaintiff. *Coleman v. Mullis*, 175.

PROMISSORY NOTE—*continued.*

Bona fide holder. Plaintiff not presumed to be, where plea of non est factum is filed, until he proves execution of the note. *Wilson v. Barnard*, 99. Sufficiency of circumstances to put purchaser on notice of defense, question for jury, not court. *Park v. Buxton*, 356. Non-payment of interest when due may be such a circumstance, where apparent from note or known to purchaser buying note before maturity of principal. *Id.* Inadequate consideration for purchase of note, not authorize finding that holder was not bona fide purchaser. *Hartfelder v. Clark*, 422.

Consideration. See *Contract*.

Corporation officer's authority to make. *Nunez Gin & Warehouse Co. v. Moore*, 350.

Counter-claim, presumption as to waiver of, by giving note. *National Duck Mills v. Catlin*, 246.

Creditor's note to debtor, presumptive evidence of settlement of the debt. *Fletcher v. Young*, 183.

Defenses, notice of. See catchwords "Bona fide holder," *supra*.

Estoppel by, to set up counter-claim. *National Duck Mills v. Catlin*, 245-6.

Execution of transfer of, proved by testimony of party executing transfer, without producing subscribing witness. *Christie v. Shingler*, 529.

Forged indorsement, remedies of one paying money on, and defenses of party receiving payment. *Yatesville Bkg. Co. v. Fourth Nat. Bank*, 1.

Forged note. See catchwords "Non est factum," *infra*.

Indorsee, suit for use of, when amendable by substituting him as plaintiff. *Bales v. First Nat. Bank*, 703.

Indorsement, warranty of genuineness of, by subsequent indorsement. *Yatesville Bkg. Co. v. Fourth Nat. Bank*, 1. Forged indorsement. See catchword "Forged," *supra*.

Interest, default as to, as notice of defenses to purchaser before maturity of principal. *Park v. Buxton*, 356.

Name of payee changed without maker's knowledge, a material alteration, constituting a good defense to suit against maker. *Wilson v. Barnard*, 99.

Non est factum, proof of forgery without plea of, in trover based on provision in purchase-money note, reserving title. *Citizens Bank v. Peebles*, 703.

Notice of defenses. See catchwords "Bona fide holder," *supra*.

Parol evidence as affecting. See *Evidence*, catchword "Parol."

Payment not necessarily implied by testimony as to "taking up" note, here. *Bridges v. Phillips*, 279.

Presumption of settlement of prior debts of payee to maker arises from execution of note, when. *Fletcher v. Young*, 183. See *National Duck Mills v. Catlin*, 246.

Protest; facts not entitling indorser to notice. *Bridges v. Phillips*, 279.

Renewal, estoppel by giving. *National Duck Mills v. Catlin*, 245.

PROMISSORY NOTE—*continued*.

Sealed; note is not, by scroll with L. S. after signature, though attesting clause recite it was sealed. *Waterman v. Barclay*, 108.

Sunday note executed by prisoner to his attorney for services in representing him and securing bond for his release, valid. *Few v. Gunter*, 100.

"Take up" note, meaning of. *Bridges v. Phillips*, 279.

PROMOTERS. See *Corporation*.

PROTEST. See *Promissory Note*.

PROXIMATE CAUSE. See *Negligence*.

PUBLIC ROAD. See *Road*.

PURCHASE. See *Sale*.

QUANTUM MERUIT. See *Action*.

QUO WARRANTO. See *Officer*.

RAILROAD.

Action against carrier for goods not delivered at destination. *So. Ry. Co. v. Strozier*, 157.

Action against carrier in justice's court; technical pleading not required in. *Fine v. So. Express Co.* 163.

Action against carrier, whether ex contractu or ex delicto; rule that construction favorable to jurisdiction should be adopted, in case of doubt. *Id.* 161. Action held to be ex contractu, and not in nature of trover. *Id.* 163.

Action against connecting carrier. See catchwords "Connecting carrier." *infra*.

Action against, venue of. See catchword "Venue," *infra*.

Action based on common-law liability, not convertible into suit on statutory liability as connecting carrier. *Hartwell Ry. Co. v. Kidd*, 771.

Action for homicide of employee; prima facie case made by proof that it occurred while he was discharging duties of his employment. *Atkinson v. Hardaway*, 389.

Alighting from moving train, when not, as matter of law, negligence preventing recovery for injury. *So. Ry. Co. v. Parham*, 531. Liability for injury in alighting, to one who went aboard to assist passenger. *Id.*

Animals, injuries to. See catchwords, "Noise," "Stock," *infra*.

Attempt to wreck train. See *Criminal Law*.

Bill of lading. Error in admitting in evidence, without proof of execution; immaterial, in suit against carrier for failure to deliver goods, where defense was that it had delivered them. *Ga., Fla. & Ala. Ry. Co. v. Fla. & Ga. Tobacco Co.* 38. To consignee's order, with draft attached, effect of. *So. Ry. Co. v. Strozier*, 157. Presentation of, as condition precedent to delivery. *So. Ry. Co. v. Strozier*, 161; *Kaufman v. S. A. L. Ry.* 241. Effect of, as receipt, under Mississippi statute. *Illinois Central R. Co. v. Doughty*, 317. Variance between description in, and articles tendered by carrier as having been shipped under it. *Id.*

RAILROAD—*continued.*

- Brakes; failure to apply "emergency brakes." *A. C. L. R. Co. v. Whitaker*, 207, 208.
- Burden of proof in suit for injury to employee. *Central Ry. Co. v. McGuire*, 484. And see *Master and Servant*.
- Charges. See catchword "Rate," *infra*.
- Claim against, time of notice of, as condition precedent to suit; valid stipulation as to. *Roberts v. G. S. & F. Ry. Co.* 100.
- Conductor's language and manner to passenger, not authorize punitive damages here. *So. Ry. Co. v. Cartledge*, 524. See 526. Damages authorized here. *G. S. & F. Ry. Co. v. Ransom*, 558.
- Connecting carrier, suit against, without allegation as to receipt of goods in good order, held based, not on statute, but on common-law liability; not convertible into suit on statutory liability. *Hartwell Ry. Co. v. Kidd*, 771. Presumption as to receipt of goods in good order. *Id.*
- Contract of carriage, action on, for value of goods, without paying freight less than amount of damage to them, not maintained. *Wilensky v. Central Ry. Co.* 8.
- Contract stipulating for notice of claim, in limited time, as condition precedent to suit against carrier, upheld. *Roberts v. G. S. & F. Ry. Co.* 100.
- Crossing, injury at, by negligence in violating law regulating approach of trains to; immaterial how road or crossing came into existence. *Atkinson v. Fountain*, 307.
- Delivery; presentation of bill of lading as condition precedent to delivery of goods by carrier. *So. Ry. Co. v. Strozier*, 161; *Kaufman v. S. A. L. Ry.* 249.
- Delivery to, by loading goods on car left in front of warehouse. *Central Ry. Co. v. Bird*, 423.
- Delivery to carrier, not pass title from seller sending draft for price, with bill of lading to his own order attached. *So. Ry. Co. v. Strozier*, 157.
- Depot accommodations. See catchword "Stations," *infra*.
- Derailling of train; proximate cause was trespasser turning switch, not speed or situation of switch. *Bowers v. So. Ry. Co.* 367.
- Duty to persons on track when train approaching. See catchwords, "Track," "Trespasser," *infra*.
- Emergency, as affecting question as to care. See *Negligence*.
- Employee's tort, liability for. *L. & N. R. Co. v. Hudson*, 169. Employee shot by coemployee, company not liable here. *Id.*
- Employees, injuries to. See *Master and Servant*.
- Fire destroying goods in car before shipment, liability of carrier. *Central Ry. Co. v. Bibb*, 423.
- Fire set out on right of way, spreading to other land; allegations sufficient; not necessary to give name of employee who started it. *Flint River R. Co. v. Maples*, 573. One in possession of land may recover for injury to it, without showing title. *Id.* 575.
- Fraud on carrier, by non-disclosure of value, not shown by evidence here. *Fine v. So. Express Co.* 165.

RAILROAD—*continued*.

- Freight charge, on goods damaged by carrier; when necessary to pay, in order to maintain action for value of goods. *Wilensky v. Central Ry. Co.* 8. When shipper may recover value of lost goods without paying. *Fine v. So. Express Co.* 161. See catchword "Rates," *infra*.
- Fright of animal from noise of train. *Chance v. So. Ry. Co.* 702.
- Homicide by employee shooting coemployee, company not liable. here. *L. & N. R. Co. v. Hudson*, 169.
- Insult to passenger, as basis for damages. *G. S. & F. Ry. Co. v. Ransom*, 558.
- Interstate-commerce commission, requirement as to approval of rates, etc., by. *Riverside Milling Co. v. S. A. L. Ry.* 303.
- Interstate law. Federal "employer's liability act;" cases to which applicable; not applicable to injury on interstate railroad to foreman of gang of track hands, caused by negligent stroke of hammer by one of them while relaying rail. *C. & W. C. Ry. Co. v. Anchors*, 322. Meaning of "interstate commerce." *Id.* 325. Federal statute as affecting assumption of risk. *Boicers v. So. Ry. Co.* 367.
- Interstate shipment. See catchword "Rates," *infra*.
- Milling-in-transit privilege. See catchword "Rates," *infra*.
- Negligence, presumption of. See catchword "Presumption," *infra*.
- Noise of train, liability for injury from fright of animal, caused by. *Chance v. So. Ry. Co.* 702.
- Notice of claim, in limited time, as condition precedent to suit against carrier; valid stipulation as to. *Roberts v. G. S. & F. Ry. Co.* 100.
- Overcharge. See catchword "Rates," *supra*.
- Passenger; damages for conductor's language and manner to female passenger; \$700 not excessive. *G. S. & F. Ry. Co. v. Ransom*, 558. See catchword "Conductor," *supra*.
- Passenger injured in attempting to enter car. *So. Ry. Co. v. Crabb*, 559. When to be assisted in entering car. *Id.*
- Passenger's escort in going aboard train, duty of carrier to, arises when; liability for injury in alighting. *So. Ry. Co. v. Parham*, 531.
- Passenger; exclusion of intending passenger from waiting-room. See catchword "Stations," *infra*.
- Passenger, liability to, for injury caused by trespasser. *Bowers v. So. Ry. Co.* 373.
- Passenger; nature of damages recoverable by, for mere negligent omission of carrier. *So. Ry. Co. v. Cartledge*, 523. Nominal damages only recoverable here. *Id.*
- Passenger put off at wrong place and made ill by rain beginning later; recovery should not include damages for such illness. *Id.*
- Passenger's suit for failure to stop at flag station to which he had bought ticket; what recoverable. *Id.* Passenger with ticket to station at which train does not stop, rights of, and conductor's duty on discovering passenger's mistake. *So. Ry. Co. v. Flanigan*, 745.

RAILROAD—*continued.*

Passenger ticket not containing restrictions as to trains; purchaser entitled to assume, when not otherwise informed, that he could use it on any passenger train to destination indicated thereon. *Id.*

Passenger. See catchword "Alighting," *supra*.

Presumption as to last carrier's receipt of goods in good order. *Hartwell Ry. Co. v. Kidd*, 771.

Presumption of negligence. Presumption in case of injury to employee, before act of 1909. *Wallace v. So. Ry. Co.* 90, 94. Charge of court not negating presumption, as to individual codefendant, after charging as to presumption against company, not error, in absence of request. *So. Ry. Co. v. Parham*, 531. Error in charging on, in suit for putting passenger off at wrong place, defendant admitting negligence. *So. Ry. Co. v. Cartledge*, 523. Presumption rebutted by proof that engineer's vision was obscured by rain, etc.; recovery set aside. *A. C. L. R. Co. v. Thomas*, 45. Rebutted as to stock killed by train, recovery set aside. *A. C. L. R. Co. v. Whitaker*, 207. Not rebutted. *G. S. & F. Ry. Co. v. Kell*, 675; *So. Ry. Co. v. Patton*, 678; *M., D. & S. R. Co. v. Smith*, 706.

Privilege of milling in transit. See catchword "Rate," *infra*.

Proximate cause of injury on. See catchwords, "Speed," "Switch," *infra*; and see *Negligence*.

Railroad commission's rules, presumption as to reasonableness of. *Smith v. S. A. L. Ry.* 227. Rule as to time of keeping open waiting-rooms for passengers, reasonable. *Id.*

Rates; judicial cognizance not taken of schedule of rates filed by carrier with interstate-commerce commission and published. *Hartwell Ry. Co. v. Kidd*, 771. Overcharge on interstate shipment, not recoverable without proof of lawful rate. *Id.*

Rates under agreement to grant milling-in-transit privilege; compliance with law as to approval by interstate-commerce commission, etc., not shown; demurrer sustained to action for damages on account of refusal to accord agreed privilege. *Riverside Milling Co. v. S. A. L. Ry.* 303.

Receipt for goods shipped. See catchwords "Bill of lading," *supra*.

Rule as to hours for keeping open waiting-rooms at stations, reasonable. *Smith v. S. A. L. Ry.* 227.

Rule as to stopping places for certain passenger-trains, power to adopt. *So. Ry. Co. v. Flanigan*, 745.

Rule, whether reasonable, a question of law. *Smith v. S. A. L. Ry.* 227, 233.

Rules for employees. See *Master and Servant*.

Speed, not proximate cause of derailment here. *Bowers v. So. Ry. Co.* 367.

Stations; rule as to time of opening and closing waiting-rooms, reasonable; intending passenger (woman) excluded at night and made ill by exposure, not entitled to recover. *Smith v. S. A. L. Ry.* 227. Dissent, 235. Power to adopt rule that certain passenger-trains shall stop only at designated stations. *So. Ry. Co. v. Flanigan*, 745.

RAILROAD—continued.

Stock killed by train. Jury authorized to disregard uncontradicted part of engineer's testimony, where other parts were contradicted. *M., D. & S. R. Co. v. Barfield*, 105. Failure to apply "emergency brakes," explained. *A. C. L. R. Co. v. Whitaker*, 208. Inclusion of interest in aggregate amount of damages for. *M., D. & S. R. Co. v. Hasty*, 104. See catchwords "Presumption of negligence," *supra*.

Stock shipped. Overcharge for feeding; evidence not authorizing recovery. *Hartwell Ry. Co. v. Kidd*, 771. Recovery of damages for injury to, barred by failure to present claim in time stipulated by contract (before the stock was removed or intermingled with other stock). *Roberts v. G. S. & F. Ry. Co.* 100.

Switch allowed to remain unlocked, not actionable negligence as to train-hand injured by derailment caused by trespasser turning switch; aliter as to passenger. *Bowers v. So. Ry. Co.* 367. Proximate cause of derailment, act of trespasser, not speed or situation of switch. *Id.*

Ticket. See catchword "Passenger," *supra*.

Track, person seated on, killed by train; sufficiency of allegations, as against demurrer. *A. C. L. R. Co. v. Cheeks*, 411.

Trespasser causing derailment. See catchword "Switch," *supra*.

Trespasser, liability for injury to. *A. C. L. R. Co. v. Cheeks*, 411.

Trover against carrier, for goods not delivered at destination. *So. Ry. Co. v. Strozier*, 157.

Value, fraud by non-disclosure of, by shipper, not shown by evidence here. *Fine v. So. Express Co.* 165.

Venue of action against, for negligent homicide, county in which the injury was inflicted, not where the death occurred. *Atkinson v. Hardaway*, 389.

Waiting-rooms. See catchword "Stations," *supra*.

Wrecking train. See *Criminal Law*.

RAPE. See *Criminal Law*.

RATES. See *Railroad*.

RATIFICATION. See *Principal and Agent*.

REAL ESTATE. See *Cemetery; Damages; Deed; Landlord and Tenant; Possession; Sale; Timber; Title; Trespass*.

Crops growing and immature are realty, and not recoverable by possessory warrant. *Gainous v. Martin*, 210.

REASONABLE DOUBT. See *Charge of Court*.

RECOGNIZANCE. See *Bond*.

RECORD. See *Deed; Lien; Notice*.

RECOUPMENT. See *Pleading*.

REGISTRATION. See *Deed*, catchword "Recording;" *Lien; Notice*.

REMEDY. See *Action; Appeal; Certiorari; Damages; Garnishment; New Trial; Practice in Court of Appeals*.

REMOVAL OF CAUSE.

United States court judgment remanding case to State court is final, and State court should take jurisdiction. *Queen Ins. Co. v. Peters*, 289, 291.

RENEWAL. See *Contract*.

RENT. See *Landlord and Tenant*.

REOPENING CASE. See *Trial*.

REPAIRS. See *Landlord and Tenant*; *Municipal Corporation*.

REPLEVY. See *Bond*.

REPRESENTATION. See *Administrator*; *Fraud*, catchword "Misrepresentation."

REPUTATION. See *Criminal Law*; *Evidence*; *Slander*.

REQUEST TO CHARGE JURY. See *Charge of Court*.

RES GESTÆ. See *Evidence*; *Words and Phrases*.

RES JUDICATA. See *Judgment*.

RESALE. See *Damages*.

RESCISSION. See *Fraud*; *Landlord and Tenant*; *Sale*.

RESIDENCE. See *Corporation*; *Domicile*; *Limitations*, catchwords "Non-residence;" *Officer*.

RISK. See *Master and Servant*, catchwords "Assumption of risk."

RIVER. See *Boundary*.

ROADS. See *Criminal Law*; *Negligence*, catchword "Highway;" *Railroad*.

Municipal requirements as to work on streets by residents, or payment of commutation tax, not in conflict with State law, here. *Whitehead v. Vienna*, 337.

ROBBERY. See *Criminal Law*.

ROME. See *Municipal Corporation*.

RULE. See *Master and Servant*; *Railroad*.

SALE. See *Contract*; *Criminal Law*; *Levy and Sale*; *Liquor*; *Statute of Frauds*.

Acceptance, as waiver of defects. *Acme Brewing Co. v. Rahr Sons Co.* 564. Buyer's sale of deteriorating goods which the seller had refused to take back, not amount to acceptance. *Salant v. Dannenberg Co.* 263. Acceptance in writing, of written order for goods, not necessary, to bind purchaser, where the goods were shipped. *Case Threshing Machine Co. v. Donaldson*, 428. Acceptance of offer to sell. See *Contract*, catchword "Offer."

Accounts of, from agent; sufficiency of proof as to genuineness. *Nat. Produce Co. v. Cairo Melon Growers Asso.* 338.

Agent not liable for breach of warranty in. *Pyle v. Boos*, 760.

Agent not liable to principal for damages on account of defects in goods purchased for principal, when. *National Duck Mills v. Catlin*, 240.

Agent's authority as to. See *Principal and Agent*.

Agent's liability for not selling as directed. See catchword "Factor," *infra*.

SALE—continued.

Agent's negligent advice to principal in regard to sales, causing loss; liability of agent. *Nat. Produce Co. v. Cairo Melon Growers Asso.* 338.

Bill of lading to seller's order, with draft attached, effect of. *So. Ry. Co. v. Strozier*, 157.

Breach of contract for. See *Contract*.

Broker's commission. See *Principal and Agent*.

Bulk sales of goods, etc. Act of 1903 not applied to settlement with all creditors, whereby the stock was turned over to a third person for sale, and the proceeds paid to the creditors. *Stovall Co. v. Shepherd Co.* 498.

"Cash sale," meaning of, in statute providing for retention of title until payment, in sales of certain products by planters, etc. *A. C. L. R. Co. v. Gordon*, 311. Sale was "cash sale" though purchaser was allowed a short time to get cash, after delivery. *Id.*

Commission on sale of land. See *Principal and Agent*.

Conditional sale not recorded, held absolute as to creditors of donee of purchaser, when. *Reisman v. Wester*, 96.

Consignment to factor for sale. See catchword "Factor," *infra*.

Contract construed, as to whether creating relation of vendor and vendee, or landlord and tenant. *Hodnett v. Mann*, 666; *Brundrige v. State*, 816.

Cotton, contract for sale of, not wanting in mutuality. *McGhee Cotton Co. v. Herrine*, 700. Not necessary to tender agreed price before date fixed for delivery. *Id.* Whether unilateral, and whether a gaming contract, jury questions, here. *Livingston v. Martin*, 766. See catchwords, "Cash sale," *supra*; "Future delivery," "Futures," *infra*.

Damages for breach of contract of. See *Contract*, catchword "Breach."

Defects. Plea of total failure of consideration, not sustained, as to machine not adapted to purpose for which bought, but retained and not shown to be wholly valueless for any purpose. *Stimpson Specialty Co. v. Parker*, 295. No data given as basis of deduction from price, defendant not allowed reduction for partial failure. *Id.* See catchword "Waiver," *infra*.

Delivery. To carrier, not pass title from seller sending draft for price, with attached bill of lading to his own order. *So. Ry. Co. v. Strozier*, 157. On cash sale, not pass title before payment, when. *A. C. L. R. Co. v. Gordon*, 311. "At the rate of 3 or 4 cars per month," in contract for delivery of 40 cars, construed as to time of delivery. *Barnes Coal Co. v. Southland Mills*, 485. Not made at time and place agreed; no demand for delivery was necessary before suit for breach of contract. *McNamara v. Georgia Cotton Co.* 669. Acceptance and use of article took parol contract of sale out of statute of frauds. *Patrick v. Shields*, 506. See catchwords, "Future delivery," "Futures," *infra*.

Demand for delivery, when not necessary. *McNamara v. Georgia Cotton Co.* 669.

SALE—*continued*.

- Description of property; sufficiency of, in bill of sale (of staves). *Estere v. Rosengrant*, 286. And see *Deed*.
- Executory, with stipulation against countermand without mutual consent; seller not entitled to deliver after countermand and sue for price; remedy, suit for damages for breach of contract. *Linder v. Cole Brothers Co.* 102. See next note.
- Factor's powers, where advances are made by him on property consigned for sale. *Frost v. Powell*, 95.
- Factor's violation of instructions as to, what recoverable. *Id.*; *Wood v. Jones*, 735. Damages set off in factor's suit for advances. *Id.* 735.
- Future delivery of goods, executory agreement for, when valid. *Farmers Oil Co. v. Rosenthal*, 416.
- Futures, illegal contract for sale of; evidence authorizing verdict that contract providing for delivery of cotton was. *McNamara v. Georgia Cotton Co.* 669. Parol evidence admissible to show that contract apparently relating to actual sale was for sale of futures. *Id.* Whether contract was for sale of, was question for jury, here. *Livingston v. Martin*, 766.
- Fraud in sale. See *Debtor and Creditor*; *Fraud*.
- Horse trade, fraud in, as defense to note. *Mizell Live Stock Co. v. Banks*, 362. Warranty not excluded by terms of note here. *Id.* 363-4. Facts not authorizing conviction of cheating and swindling in. *Odum v. State*, 27.
- Illegal. Purpose of purchaser, as affecting seller. *Kinard v. State*, 133. See catchwords, "Future delivery," "Futures," *supra*.
- "Lease," when held to be sale. *Brundrige v. State*, 816. Compare *Hodnett v. Mann*, 666.
- Machine defective. See catchword "Defects," *supra*.
- Misrepresentation in. See *Fraud*.
- Notice of intention to resell, on failure of buyer to take goods, necessary allegation as to, in suit for deficiency. *Sims-McKenzie Co. v. Patterson*, 742.
- Notice to seller, that buyer will not accept goods, breach of contract. *Linder v. Cole Brothers Co.* 102.
- Offer of price before delivery, when not necessary. *McIlhee Cotton Co. v. Herrine*, 700.
- Offer to sell. See *Contract*, catchword "Offer."
- Option to buy. See *Contract*.
- Order for goods, when binding. *Case Threshing Machine Co. v. Donaldson*, 428.
- Parol agreement as to. See *Evidence*, catchword "Parol;" *Statute of Frauds*.
- Possession retained by vendor, when no fraud against creditors. *Jowers v. High Point Furniture Co.* 297.
- Rejected goods, sale of, where deteriorating in value. *Salant v. Dannenberg Co.* 263.
- Rent, contract nominally for, held to be sale. *Brundridge v. State*, 816. Compare *Hodnett v. Mann*, 666.

SALE—*continued*.

Representations: authority of salesman as to. *Case Threshing Machine Co. v. Ezzell*, 647. See *Fraud*, catchword "Misrepresentation."

Resale by vendor on failure of buyer to take goods ordered; suit for deficiency; necessary allegations as to notice of intention to resell, etc. *Sims-McKenzie Co. v. Patterson*, 742. Demurrage and brokerage not recoverable, under facts here. *Id.*

Rescission. Evidence authorizing inference of. *Robinson v. Rothschilds*, 237, 239. For fraud in sale of horse. *Mizell Live Stock Co. v. Banks*, 362. For defect, when not allowed. *Acme Brewing Co. v. Rahr Sons Co.* 564. Return of property as condition of. *Id.* 566-7.

Sample, sale by, amounting to express warranty of quality. *Salant v. Dannenberg Co.* 265.

Tender of agreed price before date fixed for delivery, when not necessary. *McGhee Cotton Co. v. Herrine*, 700.

Title not passed by delivery, when. See catchword "Delivery," *supra*.

Title reserved in vendor. See *Title*.

Trover for property obtained under contract induced by fraud. *Story v. Williams*, 392.

Waiver of defects by acceptance. *Acme Brewing Co. v. Rahr Sons Co.* 564. Conduct not amounting to acceptance of goods which the seller had refused to take back. *Salant v. Dannenberg Co.* 263.

Warranty. In sale by sample. *Salant v. Dannenberg Co.* 265. As to age of horse, not excluded by terms of contract here. *Mizell Live Stock Co. v. Banks*, 363-4. From description, as to non-alcoholic character of beverage. *Bush v. Hessig-Ellis Co.* 590-1. Seller not protected, as to latent disease existing and known to him and not to seller at time of sale, by stipulation in note that "after delivery" the seller does not warrant soundness, etc. *Edenfield v. Coleman*, 355. Irrelevant testimony as to, prejudicial here. *First Nat. Bank v. Spicer*, 505. Agent not liable for breach of. *Pyle v. Booz*, 760.

Written contract as to, when necessary. See *Statute of Frauds*.

SAMPLE. See *Sale*.

SATISFACTION. See *Accord and Satisfaction; Payment*.

SCHOOLS. See *Criminal Law*, catchword "Disturbing."

Attorney to make argument before legislative committee, power of district-school trustees to employ. *Taylor v. Matthews*, 852.

District schools, powers of trustees, as to contracts and expenditures. *Taylor v. Matthews*, 852. Power to pay expense of resisting proposed legislation affecting school district. *Id.* Power to contract for tuition of children attending school in adjoining district. *Id.*

Repeal of local-tax law, not affect title to funds paid to trustees while the law was in force. *Id.*

SEAL. See *Contract; Corporation*.

SEARCH. See *Criminal Law*.

SECRETARY OF STATE.

Determination of boundary line between counties by, where disputed; statute providing for, not unconstitutional as being attempt to confer judicial power. *Early County v. Baker County*, 305.

SECURITY. See *Bond*; *Collateral Security*; *Mortgage*; *Principal and Surety*.

SELF-DEFENSE. See *Criminal Law*.

SEPARATION OF JURORS. See *Jury*.

SEQUESTRATION OF WITNESS. See *Witness*.

SERVICE. See *Master and Servant*.

Architect employed to prepare plans, without agreement as to compensation, entitled to reasonable value of services, though employer decided not to have building erected. *Douglas v. Rogers*, 486.

SERVICE OF PROCESS.

Minor, statute as to service on, not apply strictly in case of minor filing counter-affidavit to foreclosure proceeding. *Sams v. Covington Buggy Co.* 191.

SETTLEMENT. See *Accord and Satisfaction*; *Payment*.

SEWERS. See *Municipal Corporation*.

SHOOTING. See *Criminal Law*, catchwords "Game," "Homicide," "Shooting."

SIGNATURE. See *Contract*.

SILENCE. See *Estoppel*.

SLANDER.

Character of plaintiff bad; no defense to slander suit based on charge of crime; but may mitigate damages. *Redfearn v. Thompson*, 550.

Presumption of innocence of plaintiff, as to crime charged; proper instruction to jury. *Id.*

SOLICITOR. See *Argument*; *Attorney at Law*; *Criminal Law*.

SOUTH CAROLINA. See *Boundary*.

SPECULATIVE CONTRACT. See *Contract*.

SPEED. See *Railroad*.

STATE. See *Boundary*.

STATEMENT OF DEFENDANT TO JURY. See *Criminal Law*.

STATIONS. See *Railroad*.

STATISTICS. See *Evidence*.

STATUTE OF FRAUDS.

Acceptance taking contract as to sale out of the statute, how shown. *Wilkerson v. Patton Sash Co.* 698; *McGhee Cotton Co. v. Herring*, 700.

All terms of the contract, and assent by both parties, must be in writing, to comply with the statute. *Wilkerson v. Patton Sash Co.* 697.

STATUTE OF FRAUDS—*continued*.

Authority may be conferred by parol to execute contract required to be in writing. *Wesley v. Boyd*, 9; *McNamara v. Georgia Cotton Co.* 669.

Debt of another, parol promise to pay, repugnant to, when. *Harris v. Paulk*, 334. Parol agreement with creditor of corporation, by one interested in the debtor's business, to pay the debt, and future indebtedness, in consideration of a loan to be used in the business, was enforceable. *Holcomb v. Mashburn*, 781.

Delivery, acceptance, and use of article took parol contract of sale out of the statute. *Patrick v. Shields*, 506.

Part of contract in parol, not compliance with statute. *Wilkerson v. Patton Sash Co.* 697.

Ratification parol, of agent's unauthorized written contract as to improvements on land, not bind principal, when. *McMichen v. Brown*, 506.

Receipt of goods without acceptance, not meet requirements of. *Knowles v. Dayries Rice Co.* 569.

Sale, parol authority to execute written contract as to. *Wesley v. Boyd*, 9; *McNamara v. Georgia Cotton Co.* 669.

STATUTES. See *Code Sections*; *Constitutional Law*; *Statutes Cited*.

Codifier's omission of statute. *Hicks v. Moyer*, 488, 491.

Construction of terms. See *Words and Phrases*.

Pleading; not necessary to plead statute of this State. *Atkinson v. Hardaway*, 390.

Repeal by enactment of general law covering same subject-matter. *Hammond v. State*, 143.

STATUTES CITED. See *Code Sections*.

General laws since Code of 1910: Acts 1910, p. 92 (operation of automobiles). *Fuller v. Inman*, 695. Acts 1910, p. 134 (offense of carrying pistol without license). *James v. State*, 13; *Vero v. State*, 23. Acts 1910, p. 137 (offense of shooting at or into dwelling). *English v. State*, 791. Acts 1911, p. 137 (game law). *Hammond v. State*, 143. Acts 1911, p. 149 (mode of excepting to failure to prove venue or time of offense. *Wall v. State*, 136; *Parrish v. State*, 836. Acts 1911, p. 180 (U. S. liquor license, evidence of violation of prohibition law). *Casidy v. State*, 123.

United States statutes. See *Railroad*, catchword "Interstate."

STEALING. See *Criminal Law*.

STOCK. See *Corporation*; *Criminal Law*, catchwords "Malicious killing;" *Railroad*.

STREAM. See *Boundary*.

STREETS. See *Municipal Corporation*.

SUIT. See *Action*.

SUNDAY. See *Contract*; *Criminal Law*.

SUPERIOR COURT. See references under *Practice*.

SUPREME COURT. See *Practice in Court of Appeals*.

SURETYSHIP. See *Principal and Surety*.

SURPLUSAGE. See *Verdict*.

SURPRISE. See *Continuance*.

TAGS. See *Fertilizer*.

TAXES. See *Liquor*.

Evidence showing what property was returned by taxpayer, certified copy from tax digest admissible as. *Baker v. Gaskins*, 679.

Schools, local taxation for. *Taylor v. Matthews*, 852.

Street tax, validity of. *Whitehead v. Vienna*, 337.

TELEGRAPH COMPANY.

Addressee not designated in official capacity, in message on official business, immaterial here. *Cronheim v. Postal Tel. Co.* 728-9.

Agency; whether railroad agent receiving message for transmission was agent of sender or of telegraph company. *W. U. Tel. Co. v. Ford*, 606, 615.

Agent's right of action for non-delivery of message sent for principal. *Cronheim v. Postal Tel. Co.* 729-30.

Claim against, stipulation for 60-days' notice of; when complied with by filing suit and service thereof in that time. *W. U. Tel. Co. v. Ford*, 606, 620. Such notice suffices though the suit be dismissed and renewed after that time. *Id.*

Damages for delay in delivery of message requesting attendance of physician. *W. U. Tel. Co. v. Ford*, 606, 615.

Damages for non-delivery of message from payee to drawee of check, to stop payment by drawee to insolvent bank collecting it. *Cronheim v. Postal Tel. Co.* 716.

Delay in delivering message to physician, whether proximate cause of loss of eye. *W. U. Tel. Co. v. Ford*, 606, 618.

Holiday, liability for negligence as to message received on. *Id.* 606, 620.

Notice of claim against, requirements as to. *Id.* 606, 620.

Proximate cause of loss, whether non-delivery of message; cases collected. *Cronheim v. Postal Tel. Co.* 725. And see catchword "Delay," supra.

TENANT. See *Landlord and Tenant*.

TICKET. See *Railroad*, catchword "Passenger."

TIMBER.

Description not too indefinite, in lease of "all the timber suitable for turpentine purposes," growing on a lot designated by number, district, county, and State, though number of acres was not stated. *Cherry Lake Co. v. Lanier Armstrong Co.* 339. Cases as to indefiniteness, distinguished. *Id.* 341.

Fire from railroad right of way, destroying; recovery for. *Flint River R. Co. v. Maples*, 574.

Partner's authority to convey for firm. *Cherry Lake Co. v. Lanier Armstrong Co.* 343.

Possession of land, as basis of recovery of timber cut. *Taylor v. Keen*, 106.

TIMBER—*continued*.

Realty, standing trees are. *Cherry Lake Co. v. Lanier Armstrong Co.* 339.

Time limit specified, reasonable time implied (to be determined by jury), for exercise of rights under lease. *Id.* 344.

Trespass by cutting; defendant with actual notice of plaintiff's rights, not protected by defects in formal execution of leases. *Id.* 339, 344.

Trover for, based on prior possession of land. *Taylor v. Keen*, 106.

"Turpentine season," meaning of. *Peacock v. State*, 402.

TIME. See *Amendment; Contract; Criminal Law; Limitations; Payment; Practice in Supreme Court.*

Judicial cognizance taken as to computation of. *Williams v. Allison*, 840.

TITLE. See *Deed; Timber; Trover.*

Bond for title, instrument held to be, and to create relation of vendor and vendee, not landlord and tenant. *Brundrige v. State*, 816. Compare *Hodnett v. Mann*, 666.

Conclusion of witness, as to ownership of personal property, testimony of person in possession not inadmissible as. *Brooks v. Griffin*, 497.

Delivery not pass title to buyer, under statute as to retention of title until payment, in cash sales of certain products by planters, etc.; meaning of "cash sale." *A. C. L. R. Co. v. Gordon*, 311.

Delivery to carrier, not pass title from seller sending draft for price, with bill of lading to his own order attached. *So. Ry. Co. v. Strozier*, 157.

Forgery of, when shown without plea. *Citizens Bank v. Peebles*, 703.

Indorsement of check, "for collection and deposit" to account of payee, not pass title, without further agreement. *Cronheim v. Postal Tel. Co.* 716, 721.

Notice; sufficiency of circumstances to put purchaser on inquiry, a jury question. *Robinson v. Rothchilds*, 239.

Possession, as basis of recovery; facts showing such interruptions of possession as to prevent recovery. *Taylor v. Keen*, 106-7. Effect of intent to return, after interruption of actual possession. *Id.* 107.

Possessor of realty entitled to recover for damage to it, without showing other title. *Flint River R. Co. v. Maples*, 575.

Record of. See *Deed; Lien.*

Reservation of, in sale of personalty, not recorded, invalid as to creditors of donee of purchaser, when. *Reisman v. Wester*, 96.

TORTS. See *Action; Damages; Malicious Prosecution; Master and Servant; Negligence; Railroad; Slander; Trespass; Trover.*

TREES. See *Timber.*

TRESPASS. See *Criminal Law; Negligence; Railroad; Timber.*

Cemetery lot; damages for wrongfully entering upon, and disinterring dead body. *McDonald v. Butler*, 845.

Easement of burial; deprivation of use of; what recoverable. *Id.*

TRESPASS—*continued*.

Eviction malicious, action for. *Murphey v. Creamer*, 602.

Possession authorizes possessor to recover for. *Flint River R. Co. v. Maples*, 575.

TRIAL. See *Action*; *Argument*; *Charge of Court*; *City Court*; *Continuance*; *Criminal Law*; *Evidence*; *Judgment*; *Jury*; *Justice's Court*; *New Trial*; *Nonsuit*; *Pleading*; *Verdict*.

Absence of judge from court-room, when not cause for new trial. *Brantley v. State*, 24. From county while jury in criminal case were deliberating, vitiated the trial and rendered the verdict a nullity. *Martin v. State*, 455.

Consent of counsel; when bad practice for judge to inquire as to, in hearing of jury. *Carter v. State*, 851.

Demand for. See *Criminal Law*, catchword "Demand."

End of, not reached until verdict. *Martin v. State*, 455.

Irregularity, presumption of harm from. *Id.* 456-7.

Mistrial on account of tender of illegal evidence, not required, when. *Herring v. State*, 88. Error in not declaring mistrial on account of improper argument. *Knowles v. Dayries Rice Co.* 567. Not declared on account of judge's question to counsel in hearing of jury, here. *Carter v. State*, 851.

Postponement. See *Continuance*.

Preparation, time for (in criminal case). *Grusin v. State*, 151.

Remark of judge, proper mode of objection to. *Kidd v. State*, 148. Complimenting witness in hearing of jurors before trial; objection first made in motion for new trial, too late. *Id.* 147. When not improper, in ruling as to admissibility of testimony, to state recollection of testimony introduced. *Brooks v. Griffin*, 497. Remark to jury, when told that they stood ten to two, improper. *Peavy v. Clemons*, 507. Remark in directing verdict for two of three codefendants, not intimation as to guilt of third. *Montgomery v. State*, 801.

Remark prejudicial to accused, made in hearing of juror before jury impaneled; remedy. *Martin v. State*, 798.

Reopening case, to receive additional testimony, discretionary. *Grusin v. State*, 152-3.

Stopping trial, to procure witnesses to meet disclosures in testimony; no abuse of discretion in refusing to stop. *Little v. State*, 826.

TROVER.

Action construed as not in nature of trover. *Fine v. So. Express Co.* 163.

Agreement can not enlarge essentials of trover suit. *McCord v. Hill*, 254.

Animal's death, as defease. *Id.*

Available when. *Hicks v. Moyer*, 489.

Bail-trover; amount of defendant's recovery, where plaintiff is non-suited; defendant not owner of the property holds the money for those entitled to it. *Kaufman v. S. A. L. Ry.* 248.

Bankrupt's discharge, no defense to, though money verdict elected; issue is as to title, not debt. *Birmingham Fertilizer Co. v. Cox*, 699.

TROVER—*continued.*

- Barred after four years, by law omitted from code, but still of force. *Hicks v. Moyer*, 488.
- Carrier not delivering shipment at destination, trover against. *So. Ry. Co. v. Strozier*, 157.
- Conversion by disposing of property after obtaining possession with notice of another's title to it. *Patrick v. Henderson*, 285.
- Conversion by factor selling cotton before time instructed. *Wood v. Jones*, 738.
- Conversion shown without demand. *Hicks v. Moyer*, 488; *Citizens Bank v. Peebles*, 705.
- Damages, what recoverable by plaintiff entitled to possession of the property as security. *A. C. L. R. Co. v. Gordon*, 312.
- Death of animal, as defense. *McCord v. Hill*, 254.
- Debt not in issue, in trover. *Birmingham Fertilizer Co. v. Cox*, 690.
- Demand before suit, when not necessary. *Hicks v. Moyer*, 488; *Citizens Bank v. Peebles*, 705.
- Demurrer to statement of aggregate value, not upheld. *McCord v. Hill*, 254.
- Description of property sued for, sufficient. *Id.*
- Election as to form of verdict, in bail-trover. *Kaufman v. S. A. L. Ry.* 250.
- Essentials of. *McCord v. Hill*, 254.
- Forgery of title relied on. See catchword "Title," *infra*.
- Fraud inducing contract and transfer of property; trover as remedy. *Story v. Williams*, 392.
- Issue in, is as to title, not debt. *Birmingham Fertilizer Co. v. Cox*, 699.
- Jurisdiction not waived by giving forthcoming bond. *Hall v. Roberts*, 380.
- Jurisdiction of. See catchword "Venue," *infra*.
- Nature of the remedy. *Hicks v. Moyer*, 489.
- Pledgee's right to recover pledge in. *A. C. L. R. Co. v. Gordon*, 315.
- Possession by defendant at time of filing suit, when not necessary to show. *Citizens Bank v. Peebles*, 703.
- Possession, right of, as a basis of trover. *Taylor v. Keen*, 106.
- Promissory note sued for, evidence of its own value. *Birmingham Fertilizer Co. v. Cox*, 699.
- Secured creditor's rights in, where entitled to possession of the property as security. *A. C. L. R. Co. v. Gordon*, 312. See *Kaufman v. S. A. L. Ry.* 248.
- Statutory remedy only. *Hicks v. Moyer*, 489.
- Timber; prior possession of land, as basis of recovery. *Taylor v. Keen*, 106.
- Title held as security by plaintiff, what recoverable as damages. *A. C. L. R. Co. v. Gordon*, 312.
- Title in plaintiff when suit brought, prior possession, or right of possession, must be shown, to support trover. *So. Ry. Co. v. Strozier*, 157.
- Title, paper evidencing, attacked as forgery, without plea of non est factum. *Citizens Bank v. Peebles*, 703.

TROVER—*continued*.

Value; aggregate stated, without giving separate values of articles sued for; no ground for demurrer. *McCord v. Hill*, 254.

Value of promissory note, prima facie its amount. *Birmingham Fertilizer Co. v. Cox*, 699.

Value stated in affidavit for bail, defendant entitled to judgment for, after nonsuit. *Kaufman v. S. A. L. Ry.* 250.

Venue; county of defendant's residence. *Hall v. Roehr*, 379.

TRUSTS AND TRUSTEES. See *Bankruptcy*.

Action against trustee, for supplies to make crop on trust property, and for provisions, clothing, etc., for beneficiaries; sufficiency of allegations. *Marwell v. Rice*, 643.

Adult unfit to manage property, trust for. *Id.* 645.

Deed, trusts created by. *Id.*

Jurisdiction of city court, as to action to subject trust estate. *Id.*

Liability of trust estate for supplies. *Id.*

TURPENTINE. See *Timber*.**UNITED STATES COURT.** See *Bankruptcy*; *Removal of Cause*.**VACATION.** See *New Trial*.**VALUE.** See *Damages*; *Evidence*; *Express Company*; *Pleading*; *Trover*.**VEHICLE.** See *Negligence*.**VENDOR AND VENDEE.** See *Sale*.**VENUE.** See *Criminal Law*; *Railroad*; *Trover*.**VERDICT.** See *Jury*.

Amendable defect cured by. *Sams v. Covington Buggy Co.* 191.

Amendment; change of verdict in criminal case. *Register v. State*, 623.

Amount, error in calculation as to, cured by direction of appellate court as to increase of amount of judgment. *Avery v. Thomason*, 11.

Amount, for injury to feelings, not disturbed, unless court should suspect bias or prejudice from its excess or inadequacy. *G. S. & F. Ry. Co. v. Ransom*, 558.

Amount not excessive; \$15,000 for death of railroad yardmaster. *S. A. L. Ry. v. Hunt*, 278. \$1,500 for injury in pushing barrel against plaintiff. *C. & W. C. Ry. Co. v. Finley*, 334. \$7,000 for injury to nervous system, etc. *McGuire v. Cen. Ry. Co.* 485. Amount excessive: \$200 for putting passenger off train at wrong place. *So. Ry. Co. v. Cartledge*, 526. Amount excessive, cured by writing off part. *Douglas v. Riggs*, 486.

Compromise verdicts. *Peavy v. Clemons*, 513.

Construction; verdict to have a reasonable intendment and be held valid, if possible. *Kidd v. State*, 149; *Monk-Sloan Supply Co. v. Quitman Oil Co.* 390. Surplusage rejected. *Id.* Verdict not uncertain as to defendants; "defendant" construed as meaning defendants, when. *Id.*

Crime, verdict for wrong grade of. See catchwords "Refusal to receive," *infra*.

Direction of, by justice of peace, not proper. *Fine v. So. Express Co.* 161.

Evidence insufficient to support verdict, no reason for granting new trial, in absence of assignment of error as to lack of evidence. *Ga., Fla. & Ala. Ry. Co. v. Fla. & Ga. Tobacco Co.* 38.

VERDICT—*continued*.

Guilty, effect of general finding, where more than one count. *Morse v. State*, 61, 66. "Guilty of shooting another unlawfully," not void for uncertainty. *Kidd v. State*, 148.

Indefiniteness. See catchwords, "Construction," "Guilty," *supra*.

"Involuntary manslaughter," without more, means the higher grade. *Register v. State*, 623.

Juror not allowed to impeach his verdict. *Redfearn v. Thompson*, 551.

Justice of peace should not direct verdict. *Fine v. So. Express Co.* 161.

Polling jury, as to. See *Jury*.

Refusal to receive verdict for lower grade of crime than charged, where the accused does not object to the verdict, is error, though the verdict be unwarranted. *Register v. State*, 623. Dissent, 635. proper mode of exception to such refusal. *Id.* 625.

Shocking verdict, no ground for reversal, here. *Mayor &c. of Macon v. Morris*, 300.

Special findings, tendency toward substitution of, for general verdict. *Register v. State*, 643.

Surplusage rejected in construing. *Monk-Sloan Supply Co. v. Quitman Oil Co.* 390.

Writing off part cured excessive verdict. *Douglas v. Rogers*, 486.

WAGERING CONTRACT. See *Insurance*; *Sale*; catchwords, "Future delivery," "Futures."

WAIVER. See *Amendment*; *Criminal Law*; *Insurance*; *Jurisdiction*; *New Trial*; *Presumption*; *Sale*.

Notice of claim, waiver of stipulation as to. *Roberts v. G. S. & F. Ry. Co.* 100.

Process, waiver of irregularity in, by appearance and pleading. *Sartorius v. Paper Mills Co.* 522.

Rule of employer, waiver of, by acquiescence in violations. *S. A. L. Ry. v. Hunt*, 273.

WARRANT. See *Criminal Law*.

WARRANTY. See *Check*; *Sale*, catchword "Indorsement."

WATERCOURSE. See *Boundary*.

WEAPON. See *Criminal Law*.

WEIGHTS AND MEASURES.

Non-compliance with law as to, as defense to foreclosure of mortgage to secure debt for supplies. *Knight v. Robinson*, 549.

WELL UNPROTECTED. See *Negligence*.

WHISKY. See *Liquor*.

WIFE. See *Husband and Wife*.

WITNESS. See *Evidence*.

Absence of, as ground for continuance. See *Continuance*.

Competency of, governed by *lex fori*. *Bowers v. So. Ry. Co.* 368.

Crime no disqualification. *Id.* 368, 375.

Estoppel of party introducing, to attack testimony of; inaccurate charge to jury as to. *Holliday v. Athens*, 711, 715.

WITNESS—*continued*.

- Husband not competent to testify on trial of wife; trial for crime against his person not excepted. *Ector v. State*, 777.
- Intimidation of, as reason for leaving home; no error in allowing witness to testify to. *Solomon v. State*, 469.
- Leading question, allowance of, discretionary. *Grusin v. State*, 152.
- Means of knowing facts, error in charge of court as to, as test in weighing testimony. *Lawrence v. State*, 787.
- Separation of, violation of order as to, not disqualify. *Dennis v. State*, 219. Objection to separation waived by failing to make it in due time. *Collins v. State*, 34.
- Subscribing, need not be produced, where party executing paper testifies to its execution. *Christie v. Shingler*, 529.

WOMEN, MARRIED. See *Husband and Wife*.

WORDS. See *Criminal Law*; *Slander*; *Words and Phrases*.

WORDS AND PHRASES.

- "Abandonment" of child. *Phelps v. State*, 43.
- "Arms" (right to bear arms). *Glenn v. State*, 131.
- "Assemblage" of school, in statute as to disturbing school. *Haricell v. State*, 115.
- "At;" snooting "at" dwelling. *English v. State*, 791.
- "Autoptic preference." *Morse v. State*, 62.
- "Bad faith," in litigation. *Queen Ins. Co. v. Peters*, 289, 294.
- "Benefit order," "beneficiary order," defined. *Brown v. Bowman*, 707-8.
- "Capital stock," "minimum capital stock." *Rosenheim Shoe Co. v. Horne*, 582.
- "Cash sale," meaning of, in statute providing for retention of title until payment, in sales of certain products by planters, etc. *A. C. L. R. Co. v. Gordon*, 311.
- "Cause," "proximate cause." *Bowers v. So. Ry. Co.* 372.
- "Character," equivalent to "reputation," in legal parlance. *Peacock v. State*, 402.
- "Charge" of court defined; directions not within the definition. *Walker v. State*, 86, 87.
- "Charity." See catchwords, "Work of charity," *infra*.
- "Collecting officer," justice of peace is. *Higdon v. Williamson*, 376.
- "Commerce," in interstate-commerce law. *C. & W. C. Ry. Co. v. Anchors*, 325.
- "Compound" with debtor, meaning of. *Williams-Thompson Co. v. Williams*, 252.
- "Constructive knowledge." *Fitzgerald v. State*, 72.
- "Corpus delicti," meaning of. *Garnett v. State*, 114.
- "Court." *Broadwater v. State*, 458; *Register v. State*, 636.
- "Crime," not include offense against municipality, when. *Moore v. Winder*, 387.
- "Debt of another," in statute of frauds. *Holcomb v. Mashburn*, 783.
- "Defendant," when held to mean defendants. *Monk-Sloan Supply Co. v. Quitman Oil Co.* 391.
- "Delivery" to carrier. *Central Ry. Co. v. Bird*, 423.

WORDS AND PHRASES—*continued*.

- "Dependent," meaning of, in code section as to parent's recovery for homicide of minor on whom dependent. *Fuller v. Inman*, 680.
- "Filing," meaning of. *Veruki v. Savannah Electric Co.* 201.
- "For collection," effect of, in indorsement of check. *Cronheim v. Postal Tel. Co.* 716, 721.
- "Forcible entry and detainer." *Cate v. Knight*, 665.
- "Fraternal beneficiary order" defined. *Brown v. Bowman*, 708.
- "Full value of life," meaning of. *Atkinson v. Hardaway*, 390.
- "General agent." *Michigan Mutual Ins. Co. v. Parker*, 697.
- "General manager" of corporation. *Nunez Gin & Warehouse Co. v. Moore*, 350.
- "Good faith," on part of principal to agent employed to sell on commission. *Moore v. May*, 200.
- "Greenback." *Jones v. State*, 59.
- "Hearsay." *Fitzgerald v. State*, 71, 75.
- "House of ill-fame." See catchwords "Lewd house," *infra*.
- "Immediately," when treated as meaning "instantly," "at once." *McCullough v. State*, 407.
- "Indecent condition," in Penal Code, § 442, as to intoxication in public places, etc. *Ford v. State*, 442.
- "Injuries to personalty," in code provision as to. *Hicks v. Moyer*, 488-9.
- "Insured," meaning of, in policy. *Queen Ins. Co. v. Peters*, 289.
- "Interstate commerce." *C. & W. C. Ry. Co. v. Anchors*, 325.
- "Into;" shooting "into" dwelling. *English v. State*, 791.
- "Involuntary manslaughter," without more, means the higher grade, where used in verdict. *Register*, 623.
- "Irrevocable," in contract of agency; not equivalent to "exclusive." *Moore v. May*, 199.
- "Jewelry" defined. *Fine v. So. Express Co.* 167.
- "Keep a lewd house." *Fitzgerald v. State*, 70; *Kinard v. State*, 133; *Cotton v. Atlanta*, 397, 399.
- "Keep on hand" liquor. *Cassidy v. State*, 125; *Jackson v. State*, 143.
- "Kidnapping," (Penal Code, § 119). *Hendon v. State*, 78.
- "Laborer," in law exempting wages from garnishment. *Langley Mfg. Co. v. Frey*, 753. When not applied to one employed as manager of store, who "did all the work" of the store, swept it, and loaded goods on drays. *Pruitt v. Pace*, 201.
- "Legal representative," meaning of. *Queen Ins. Co. v. Peters*, 289, 293.
- "Representation" of decedent's estate. *Baumgartner v. McKinnon*, 219.
- "Lewd house." *Fitzgerald v. State*, 70; *Cotton v. Atlanta*, 397, 399.
- "L. S.," after signature, not sufficient to render note a sealed instrument. *Waterman v. Barclay*, 108.
- "Malt liquor," in prohibition law. *Howe v. State*, 216.
- "Manager." See catchwords "General manager," *supra*.
- "Manufacture" and "commerce" distinguished. *C. & W. C. Ry. Co. v. Anchors*, 325.
- "Meeting of school," in statute as to disturbing school. *Harwell v. State*, 115.

WORDS AND PHRASES—*continued*.

- "Minimum capital stock," meaning of. *Rosenheim Shoe Co. v. Horne*, 582.
- "Moral and reasonable certainty." *Norman v. State*, 802.
- "Near beer" defined. *Cassidy v. State*, 128.
- "Necessity." See catchwords, "Work of charity or necessity," *infra*.
- "Ordinary care," self-explanatory. *W. U. Tel. Co. v. Ford*, 606, 621.
- "Person" includes corporation, in Civil Code, § 4413, as to liability of master for tort of servant. *L. & N. R. Co. v. Hudson*, 171.
- "Personal property." See catchword "Realty," *infra*.
- "Place of business," in prohibition law. *Landreth v. State*, 401; *Flahive v. State*, 401-2. "Place of business" of cropper, not at land-lord's dwelling. *Boyd v. State*, 451.
- "Presence;" when offense will be treated as committed in presence of officer. *Smith v. State*, 37.
- "Prosecutor" defined. *Eady v. State*, 818.
- "Proximate cause." *Bowers v. So. Ry. Co.* 372. And see *Negligence*.
- "Realty" includes immature growing crops. *Gainous v. Martin*, 210. Includes standing trees. *Cherry Lake Co. v. Lanier Armstrong Co.* 342.
- "Reasonable doubt." *Norman v. State*, 802. "Reasonable and moral certainty," "to the exclusion of a reasonable hypothesis." *Id.*
- "Reasonable time." *Cherry Lake Co. v. Armstrong Lanier Co.* 344.
- "Representation" of decedent's estate, meaning of. *Baumgartner v. McKinnon*, 219. "Representative" of decedent. *Quecn Ins. Co. v. Peters*, 289.
- "Res gestæ" defined. *Carswell v. State*, 32.
- "School," in statute as to disturbing school. *Harwell v. State*, 115.
- "Sealed instrument," what constitutes. *Waterman v. Barclay*, 108.
- "Suit" defined; not applied to seizures or proceedings in rem. *Weston v. Beverly*, 261.
- "Take up" promissory note. *Bridges v. Phillips*, 279.
- "Turpentine season." *Peacock v. State*, 402.
- "Value of life." *Atkinson v. Hardaway*, 390.
- "Verbal acts." *Fitzgerald v. State*, 75.
- "Wages," in garnishment law. *Langley Mfg. Co. v. Frey*, 753.
- "Work of charity or necessity," in Sunday law. *Few v. Gunter*, 100.

WORK. See *Master and Servant*; *Service*; *Words and Phrases*.

WRECKING RAILROAD TRAIN. See *Criminal Law*.

WRITING. See *Contract*; *Evidence*; *Statute of Frauds*.

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